

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, EUGENE H. BEER, HARRY M. BENZINGER
ET AL., PLAINTIFFS-IN-ERROR,

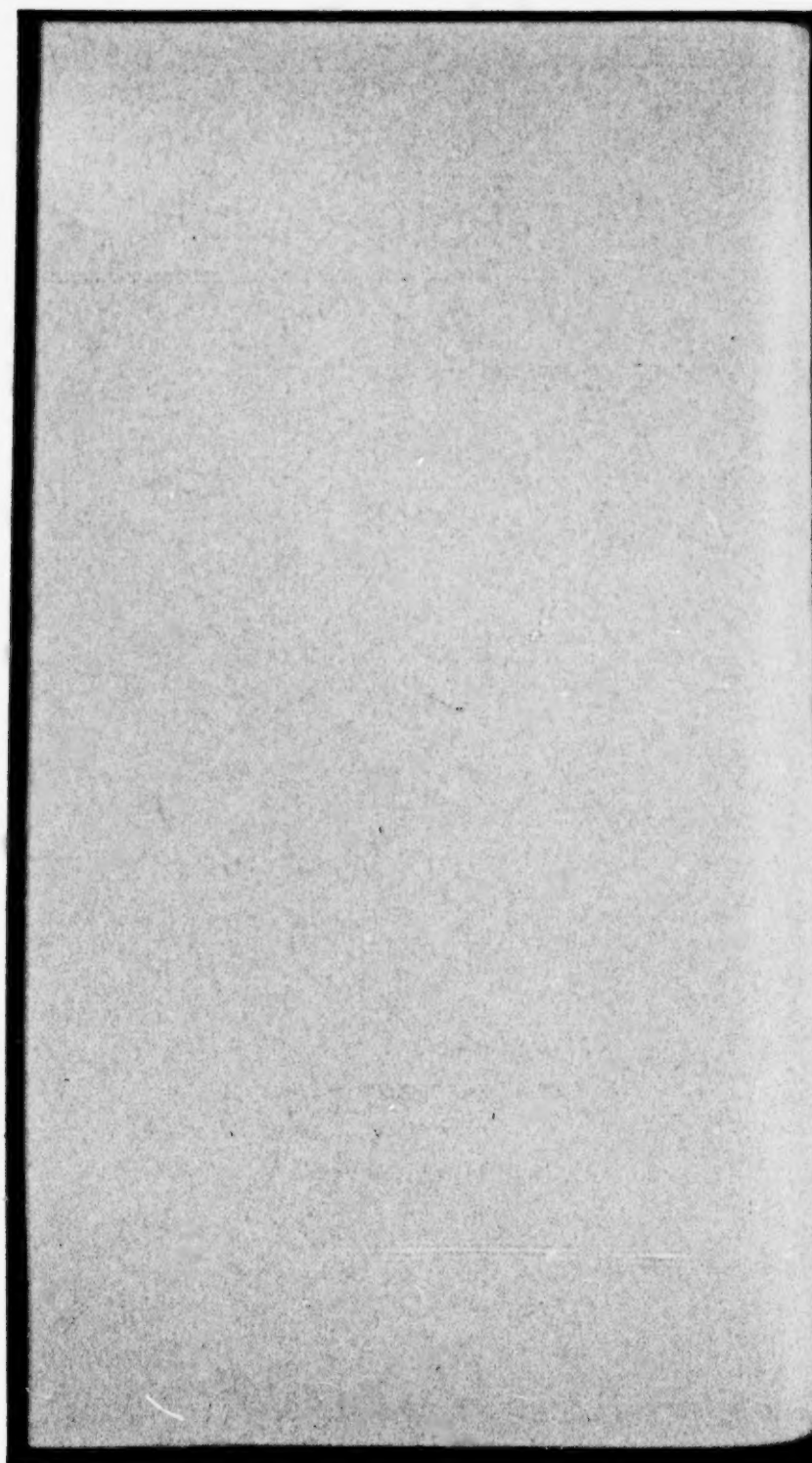
vs.

J. MERCER GARNETT, FREDERICK W. BECK, WILLIAM J
HOGAN ET AL., ETC., ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
MARYLAND.

FILED SEPTEMBER 28, 1921.

(23,508)



(28,508)

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INDEX.

	Original.	Print.
Transcript of record from the Court of Common Pleas of Baltimore	a	1
Petition for writ of mandamus and order for summons....	1	1
Exhibits A and B—Challenges to board of registry....	8	7
C—Joint resolution No. 3.....	10	8
D—West Virginia proceedings.....	12	10
E—Tennessee proceedings	14	11
Appearance of defendant	17	13
Answer to the petition.....	17	13
Petition to add parties defendants.....	19	15
Agreements of counsel as to evidence.....	21	16
Judgment	23	17
Opinion, Heusler, J.	23	18
Exception to the ruling of the court.....	29	22
Plaintiffs' order of appeal.....	30	22

	Original.	Print.
Petitioner's bill of exception.....	30	22
Testimony of Oscar Leser.....	31	23
Stipulation as to evidence.....	35	26
offers of evidence	36	27
Extracts from Constitution of State of West Virginia..	36	27
Transcript of House Journals, Assembly of Tennessee..	39	29
Report of committees, etc.....	42	31
Journals of Senate and House of West Virginia.....	120	87
Correspondence from National Association Opposed to Woman Suffrage, etc.....	150	107
Proclamation of Secretary of State, etc.....	153	109
Certified copies of the 19th Amendment to the Consti- tution of the United States, etc.....	156	111
Proceedings in Legislature of Tennessee.....	183	131
Petitioners' prayers	198	142
Judge's signature settling bill of exceptions.....	203	146
Clerk's certificate	204	146
Opinion, Offutt, J.....	206	147
Judgment	234	161
Petition for writ of error.....	238	161
Order allowing writ of error.....	238	161
Assignment of errors.....	239	161
Bond on writ of error.....	244	168
Writ of error.....	245	170
Citation and service.....	247	171
Clerk's certificate	250	173

TRANSCRIPT OF RECORD FROM THE COURT OF COMMON PLEAS
OF BALTIMORE CITY IN THE CASE OF

OSCAR LESER et al., Plaintiffs,

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the
Seventh Precinct of the Eleventh Ward of Baltimore City,
Defendants,

TO THE COURT OF APPEALS OF MARYLAND.

Wm. L. Marbury,
T. F. Cadwalader,
George Arnold Frick,
Everett P. Wheeler,
For Appellants.

Alexander Armstrong,
Lindsay C. Spencer,
Jacob M. Moses,
Maloy & Brady,
Howell & Yost,
For Appellees.

Filed March 10, 1921.

In the Court of Common Pleas.

OSCAR LESER et al., Plaintiffs,

VS.

J. MERCER GARNETT et al., Defendants.

Case Instituted in Court of Common Pleas, October 30th, 1920.

Petition and Order of Court for a Writ of Mandamus.

(Filed 30th Day October, 1920.)

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of
the Seventh Precinct of the Eleventh Ward of Baltimore City.

To the Honorable Judge of said Court:

Your petitioners, Oscar Leser, a resident and registered voter of
the Eleventh Ward of Baltimore City and a citizen and taxpayer of

said City, and Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hensley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, William E. P. Wyse, citizens, voters and taxpayers of the State of Maryland, all of whom are members of the Board of Managers of the Maryland

2 League for State Defense, an unincorporated association of citizens of this State, organized in the year 1919 with the following declared object:

"To oppose by all lawful means the ratification by the General Assembly of Maryland of the pending Woman Suffrage Amendment, thereby to preserve for the people of Maryland the right which they have possessed since colonial days to determine for themselves who shall be entitled to vote at their own elections, and thus preserve the essential feature of the sacred right of local government."

respectfully show unto your Honor:

I. That your petitioners feel aggrieved by the action of J. Mercer Garnett, Frederick W. Beck, William J. Hogan and Daniel Billmeyer, constituting the Board of Registry of the 7th Precinct of the Eleventh Ward of the City of Baltimore, in registering the names of Cecilia Streett Waters, a white female citizen, and Mary D. Randolph, a colored female citizen, at a session of the said Board held at the place of registry for said precinct on the 12th day of October, 1920, because the persons so registered are disqualified under the Constitution and laws of the State of Maryland and of the United States of America to vote at any election hereinafter to be held.

That the grounds of such disqualification were brought to the attention of said Board of Registry on the said 12th day of October, 1920, in the shape of two memoranda in writing, copies of which are filed herewith, marked "Petitioners' Exhibit A and B," respectively, which your petitioners pray to be taken and considered as a part hereof, but nevertheless the said Board of Registry overruled the challenge and objection of the petitioner, Oscar Leser, then and there made to them in the case of each of said persons, and admitted them to the said Registry as qualified voters.

II. That the so-called Nineteenth Amendment to the Constitution of the United States under and by virtue of which the said Board of Registry claim to exercise the right to admit said persons to the Registry of Voters, is not in fact or in law part of the Constitution of the United States, and is not in force and virtue

3

within the State of Maryland for the following reasons:

(1) The said alleged amendment to the United States Constitution is not such an amendment as the Congress is authorized by Article V of the Constitution of the United States to propose to the legislatures of the several states to be by them ratified in accordance with said Article V, but is wholly outside of the scope and purpose

of the amending power conferred upon Congress, subject to the ratification by three-fourths of the State Legislatures, by the said article, as is more fully and expressly set forth in the resolution of the General Assembly of Maryland rejecting and refusing to ratify the said amendment at the January Session of 1920, a copy whereof marked "Petitioners' Exhibit C" is filed herewith and prayed to be taken and considered as a part hereof.

(2) That the said alleged Nineteenth Amendment to the Constitution of the United States was never in fact ratified by the Legislatures of three-fourths of the States now composing the United States of America, the proclamation dated August —, 1920, by the Honorable Bainbridge Colby, Secretary of State of the United States, to the contrary notwithstanding.

(a) Because of the fact that it was not ratified by the Legislature of the State of West Virginia, but on the contrary was defeated and rejected by the said Legislature.

(b) And because although the Legislature of the State of Missouri undertook to pass a resolution ratifying the said measure, nevertheless it was forbidden to do so by the following provision of the Constitution of the State of Missouri:

"Article II, Section 3. We declare, That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

4 And your petitioners are advised and therefore charge that this provision of the Constitution of the State of Missouri in no wise conflicts with any provision or part or purposes of the Constitution of the United States. That Article V of the Constitution of the United States confers upon the State of Missouri as upon every other State in the Union the power, acting through its legislature or through a convention called for the purpose, to cast one vote in favor of the ratification of any amendment proposed by the Congress of the United States and declares that when ratified by the legislatures of three-fourths of the states or by such conventions in three-fourths of the states, such proposed amendment shall become a part of the Constitution of the United States. But Article V of the Constitution of the United States does not impose or purport to impose any duty upon a state to exercise this privilege, either through its legislature or its conventions. On the contrary, each state is left free to determine "when" this privilege shall be exercised by its legislature or conventions, and the people of Missouri in adopting said provisions of their Constitution have chosen to say that so far as regards such proposed amendments as "may in any wise impair the right

of local self-government, belonging to the people of this State" it shall not be exercised at all. In other words, having power to say when its legislature should act, the people of Missouri have elected to say "never" so far as this class of amendments is concerned, and so long as the section above quoted is retained in the Missouri Constitution; it being obvious that an amendment like the so-called Nineteenth Amendment which would take away from the people of the State the power and the right to determine by their own votes who shall vote at their own State elections most seriously impairs their right of local self-government.

That therefore the action of the Legislature of the State of Missouri in undertaking to ratify the so-called Nineteenth Amendment, was and is utterly void and of non-effect.

(c) And because the Legislature of the State of Tennessee being a body created under and in pursuance of the Constitution of the said State and subject to the limitations therein expressed, undertook to act upon a resolution purporting to ratify the said alleged Nineteenth Amendment, yet its action in the premises was null and void for the reason that the members of the said legislature were elected prior to the submission of the said amendment by Congress to the Legislatures of the several States, and therefore by the provisions of the Constitution of the State of Tennessee, the said existing Legislature was prohibited from acting upon said alleged amendment. The provision of said Constitution being as follows:

"No convention or General Assembly shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such amendment has been submitted."

And because even if the Legislature of the State of Tennessee at its session held in the month of August, 1920, were competent to act in the matter of ratification of the said amendment to the Constitution of the United States, the said legislature did not pass any resolution ratifying the said alleged Nineteenth Amendment, but did, in fact, defeat and reject such resolution.

III. That in support of the statements hereinbefore contained respecting the action of the Legislatures of West Virginia and of Tennessee your petitioners file herewith marked "Petitioners' Exhibit D and E," respectively, and prayed to be taken and considered as part hereof, brief statements of memoranda, showing the proceedings taken in the Senate of West Virginia and in the House of Representatives of Tennessee, respectively, in reference to the resolution of ratification as introduced in each of said bodies in regard to the settled rules of parliamentary procedure of said bodies and the constitutional provisions governing the organization and conduct of business of the said houses, and your Petitioners aver that the facts now shown are proper to be shown, notwithstanding the aforementioned proclamation of the Secretary of State of the United States, and notwithstanding any certificate or proclamation or official notice

6 that may have been furnished to the said Secretary of State by the executive officers of the States of West Virginia and Tennessee, respectively, because under and in pursuance of Article V of the Constitution of the United States, no amendment can become a part thereof until it is in fact ratified by the Legislatures of three-fourths of the States, and a certificate or official notice of the executive officers of such states or the proclamation of the Secretary of State of the United States contrary to the actual fact in this regard cannot cause an alleged amendment to be deemed as having been adopted and made a part of the Constitution contrary to the express terms and provisions of that instrument itself.

IV. And your petitioners further show that in a number of the States of the American Union, including the States of Massachusetts, New Jersey, Pennsylvania, Rhode Island, Arkansas, Maine, New Hampshire, Ohio, Iowa, Nebraska, Missouri, Texas, Kentucky and others, the people have seen fit to provide in their State Constitutions that the rights and duties pertaining to the elective franchise shall be limited to men. In these States the people have also provided that no changes should be made in their State Constitutions by any act or resolution of their State Legislatures and have thereby in effect forbidden their said respective State Legislatures to vote for the ratification of any proposed amendment to the Constitution of the United States which would have the effect of abolishing or changing the Constitution of the State.

Wherefore, your petitioners are advised and therefore charge that the action of the Legislatures of said above mentioned States in undertaking to ratify said Nineteenth Amendment to the Constitution of the United States, was and the same are utterly void and of non-effect.

Your Petitioners therefore pray:

First. That the names of the said Cecilia Streett Waters and Mary D. Randolph be struck off from the Registry of voters of the Seventh Precinct of the Eleventh Ward of Baltimore City as persons disqualified to vote.

7

And as in duty bound, etc.

OSCAR LESER,
THOMAS F. CADWALADER,
HARRY M. BENZINGER,
JOHN R. BLAND,
J. HEMSLEY JOHNSON,
EDWARD D. MARTIN,
KEY COMPTON,
EUGENE H. BEFR,
JOSEPH C. FRANCE,
JOSEPH PACKARD,
CLEMENT S. UCKER,
W. BERNARD DUKE,
JOHN H. FERGUSON,
ROBERT GARRETT,
C. WILBUR MILLER,
CHARLES O'DONOVAN,
THOMAS MARSHALL SMITH,
THEODORE E. STRAUS,
HERBERT T. TIFFANY,
MICHAEL B. WILD,
WILLIAM P. E. WYSE,

Petitioners.

WM. L. MARBURY,

Attorney for Petitioners.

STATE OF MARYLAND,

City of Baltimore, To wit:

Before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, on this 30th day of October, 1920, personally appeared Oscar Leser, one of the Petitioners named in the foregoing petition, and made oath in due form of law that the matters and facts therein stated are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[SEAL.]

ZELLA KUHN,

Notary Public.

8

Upon the foregoing petition and affidavit with the exhibits filed therewith, it is this 30th day of October, 1920, Ordered that the foregoing petition be set for hearing upon the 22nd day of November, 1920, and that the Clerk of this Court shall issue summons directed to the Sheriff of Baltimore City, requiring him to summon the Board of Registry of said Precinct to attend at the hearing

or by counsel, and that summons shall also be issued and served by the Sheriff upon the said Cecilia Streett Waters, residing at No. 824 N. Eutaw Street, and the said Mary D. Randolph (colored), residing at No. 331 W. Biddle Street, in Baltimore City, requiring them and each of them to attend at the hearing or by counsel, provided the said summons shall be so served upon the said parties prior to the 10th day of November, 1920.

WALTER L. DAWKINS.

EXHIBIT "A."

Baltimore, Md., October 12th, 1920.

To the Board of Registry of the 7th Precinct of the Eleventh Ward of Baltimore City:

The undersigned hereby challenges the right of Cecilia Streett Waters, a female citizen of the State of Maryland and a resident of the said precinct and ward of Baltimore City, to register as a qualified voter.

1st. Because the said Cecilia Streett Waters is a female citizen and the Constitution of the State of Maryland confines the right of suffrage to males.

2d. That the said Cecilia Streett Waters, has no legal right to register under the alleged Nineteenth Amendment to the Constitution of the United States:

a. Because the said alleged Nineteenth Amendment has never been legally proposed, ratified or adopted as a part of the Constitution.

b. Because the said amendment is invalid as being in excess of any power to amend the Constitution of the United States conferred by the provisions of Article 5 of the Constitution of the United States.

(Signed) OSCAR LESER,
*Individually and on Behalf of Members of the Board of
Managers of the Maryland League for State Defence.*

EXHIBIT "B."

Baltimore, Md., October 12th, 1920.

To the Board of Registry of the 7th Precinct of the Eleventh Ward of Baltimore City:

The undersigned hereby challenges the right of Mary D. Randolph, a colored female citizen of the State of Maryland and a resident of the said precinct and ward of Baltimore City, to register as a qualified voter.

1st. Because the said Mary D. Randolph, is a colored female citizen and the Constitution of the State of Maryland confines the right of suffrage to males.

2d. That the said Mary D. Randolph, has no legal right to register under the alleged Nineteenth Amendment to the Constitution of the United States:

a. Because the said alleged Nineteenth Amendment has never been legally proposed, ratified or adopted as a part of the Constitution.

b. Because the said amendment is invalid as being in excess of any power to amend the Constitution of the United States conferred by the provisions of Article 5 of the Constitution of the United States.

(Signed) OSCAR LESER,
*Individually and on Behalf of Members of the Board of
Managers of the Maryland League for State Defence.*

10

EXHIBIT "C."

Joint Resolution No. 3.

Entitled.

Joint Resolution of the Senate and House of Delegates of Maryland
Rejecting and Refusing to Ratify an Amendment to the Constitution of the United States Proposed by Congress to the Legislatures of the Several States.

Whereas, The General Assembly of Maryland has received official notification of the passage by both Houses of the Sixty-sixth Congress of the United States of a proposal to amend the Constitution of the United States, in the words following, to wit:

"Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of each House concurring therein), That the following Article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of three-fourths of the several States:

'Article —.

'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

'Congress shall have power to enforce this Article by appropriate legislation.'"

Be it Resolved by the General Assembly of Maryland, That we deny that the Congress of the United States has any lawful right or power to propose such an amendment to the Constitution of the United States; we deny that the Legislatures of three-fourths of the States have any lawful right or power to adopt such an amendment;

and we deny that such an amendment would be validly a part of the Constitution of the United States if thus adopted, for the following reasons:

The avowed purpose of the people of the United States in adopting the Federal Constitution was to establish a perpetual Union of States.

11 In order that this great purpose might be accomplished, it was essential that each State should be preserved as an indestructible political unit.

In the oft quoted words of the Supreme Court of the United States, their purpose was to establish "an indestructible Union composed of indestructible States."

For "without the States in union, there could be no such political body as the United States."

It is manifest, therefore, that when the people, in this same Federal Constitution, conferred upon Congress and the Legislatures of three-fourths of the States the power to "amend" that Constitution, it could not have been their intention to authorize the adoption of any amendment, or any measure under the guise of an amendment, which would wholly or partially destroy the States, by taking away from the States any one of their functions essential to their separate and independent existence as States.

The right of a State to determine for itself by the vote of its own people, who shall vote at its own state, county and municipal elections is one of those functions.

When we surrender to any outside power the right to say who shall vote at our state elections, we surrender the right to determine who shall govern the state, and without the right of local self-government, we cease to be a state and become a mere province, with far less power to determine our own destiny than we had prior to the American Revolution, under the charter granted by the British Crown.

Resolved Further, That the General Assembly of Maryland could not exercise the power to ratify this so-called Nineteenth Amendment, conferred upon it, or supposed to be conferred upon it, by the Fifth Article of the Constitution of the United States, without violating, in most flagrant fashion, the Constitution of our own State.

The Constitution of Maryland limits the right of suffrage to men. The people of Maryland have not conferred upon their General Assembly any right to amend that Constitution by extending the franchise to women.

12 Yet, this proposed Nineteenth Amendment to the Federal Constitution, if adopted and held valid, would, in effect, amend the Constitution of the State of Maryland in that respect, and establish woman suffrage in this State, without the consent and it may be, contrary to the wishes of a majority of both the men and women of Maryland.

We conceive that the members of this General Assembly would be false to their duty to their own people, if not to their official oaths, if they should vote to ratify the proposed Amendment.

Wherefore, be it Further Resolved, That the General Assembly of this State hereby rejects the said Nineteenth Article, proposed

as an amendment to the Constitution of the United States, and, on behalf of the State of Maryland, refuses to ratify the same.

Resolved Further, That we solemnly protest to the Legislatures of those States who have heretofore voted to ratify such amendment against their action in thus seeking to force this measure upon our people, without their consent, and we earnestly appeal to the Legislatures of those States who have not yet voted to ratify it, not to do so.

And be it Further Resolved, That the Governor be requested to forward a copy of the foregoing preamble and Resolutions, duly attested, to the Secretary of State of the United States, our Representatives and Senators in Congress, to the Governors of each of the States and to the presiding officers of each House of the Legislatures thereof.

EXHIBIT "D."

West Virginia Proceedings.

The Legislature of the State of West Virginia consists of two Houses, a Senate and a House of Delegates, constituted according to the provisions contained in the Constitution of West Virginia. The consent of both Houses is necessary to the passage of any bill or resolution by said legislature. Each House is required by

13 the Constitution of West Virginia to determine the rules of its proceedings, and any action taken by members of either House thereof contrary to the provisions of the Constitution of said State, or in disregard or violation of the rules of parliamentary procedure of such House is not the act of each House as an integral member of said legislature. Said rules of the Senate provide among other things that when a resolution has been voted upon and either passed or defeated, a motion may be made to reconsider such vote, and if such motion is defeated, the original vote must stand as the judgment of the Senate and it cannot be again acted upon during the session. Said rules also provide for their own suspension by a two-thirds vote.

The Legislature of West Virginia was called into special session on February —, 1920. The resolution ratifying the alleged Nineteenth Amendment to the Constitution of the United States was voted upon in the Senate of West Virginia on March 1st, 1920, and was defeated. On March 3rd, 1920, a motion to reconsider this vote was made and was defeated. Nevertheless on March 10th, 1920, the members of the Senate voted again upon the original resolution and 15 votes were recorded in favor thereof and 14 opposed. No motion to suspend the rules of the Senate was offered or voted upon.

A certain A. R. Montgomery, previously elected and qualified as a member of said Senate, was then present and desirous of voting in the negative, but by a majority of one the Senate refused to allow him to take his seat or to vote. The Constitution of West Virginia requires a two-thirds vote of the Senate to expel a member. Senator Montgomery was not charged with any offense or misconduct or conduct

justifying his expulsion, and no resolution to expel him was offered or voted upon.

At the same time a certain Raymond Dodson, previously elected and qualified as Senator from the 8th Senatorial District, but who had removed his residence to another Senatorial District, to wit, the 4th Senatorial District, prior to the holding of said special session of the Legislature, was permitted to vote unchallenged, and voted in favor of said resolution of ratification, although the Constitution of West Virginia provides that if any member of the Legislature removes from the district for which he shall have been elected his seat shall be thereby vacated.

The Governor of West Virginia notified the Secretary of State of the United States that the Legislature of West Virginia did on March 10th, 1920, ratify the Nineteenth Amendment, but said notification was based upon the vote recorded in the manner and under the circumstances above set forth.

EXHIBIT "E."

(Tennessee Proceedings.)

The Legislature of the State of Tennessee consists of two houses, a Senate and a House of Representatives, constituted under the Constitution of Tennessee. The consent of each of said two houses is necessary to the valid passage of any bill or resolution by said Legislature. Each house is empowered by the Constitution of Tennessee to adopt rules of parliamentary procedure. The House is entitled, by the terms of the constitution, to a membership of ninety-nine members, and the Senate to a membership of thirty-three. The constitution fixes a quorum for each of the respective houses at two-thirds of the number of members to which such house is "entitled." The House of Representatives has no constitutional power to pass a valid resolution ratifying an amendment to the Federal Constitution unless at least sixty six members (the constitutional quorum) are present.

The Legislature of Tennessee was elected in the year 1918, before the so-called Nineteenth Amendment had been proposed by the Congress or submitted to the Legislatures of the several States.

On or about August 5th, 1920, the Governor of Tennessee issued a call for a special session of the Legislature to convene on August 9th, 1920.

At said special session a joint resolution to ratify the so-called Nineteenth Amendment to the Constitution of the United States (abolishing the distinction of sex in respect of suffrage) was offered for passage in the Senate of Tennessee and declared passed by a vote of a majority of the members, a constitutional quorum being present.

On August 18th, 1920, said joint resolution was taken up for action by the House of Representatives of Tennessee. A motion to lay the resolution on the table was lost by a tie vote of 48 to 48. Subsequently, on the same day, a vote was taken on the passage of the said resolution, resulting in 50 ayes and 48 noes. Before the result became final, under the rules of the House, and in accordance with

the procedure defined by said rules, a motion to reconsider the said vote was then and there entered on the records of the House at the instance of a member who had voted for the resolution.

Under the rules of the House the entry of said motion to reconsider estopped final action on the resolution to ratify until said motion to reconsider should be disposed of by the House.

On August 21st 1920, at a so-called session of the House at which only 59 members were present (being 7 less than the constitutional quorum of 66) a majority of the members present, recognizing the necessity of first disposing of the motion to reconsider, but asserting through their leader on the floor of the House that when a State Legislature takes action on a resolution to ratify an amendment to the Constitution of the United States it is bound neither by the constitution or laws of the State nor by the rules of parliamentary procedure adopted by the respective houses in accordance with such State constitution, voted to reconsider the vote of August 18th aforementioned, and then voted to concur in the previous action of the Senate, that is, to approve the resolution of ratification.

On August 31st, 1920, after the people of Tennessee had had the opportunity of making their wishes known to their representatives, a session of the House was held at which 91 members were present. At said session the House took up the aforementioned motion to reconsider of August 18th, and by a viva voce vote adopted it 16 and reconsidered the vote of August 18th on the resolution to ratify the so-called Nineteenth Amendment. Thereupon, in strict accordance with the rules of the House and the recognized usages of parliamentary procedure, the House voted down the resolution to ratify said amendment by voting, 47 ayes to 24 noes, not to concur in the previous favorable action of the Senate on said resolution to ratify said amendment. In addition to the 71 members of the House so participating in the aforesaid action of August 31st, there were 20 members present and not voting.

The House also, thereafter and on the same day, with a quorum present, by appropriate proceedings expunged from the Journal and record of the House, the entire record of the action of the quorumless House taken on August 21st and heretofore described. On September 1st, the Senate, by a vote of 24 ayes to 3 noes, accepted the message from the House showing the reconsideration and rejection of said amendment, as aforesaid.

The official actions and proceedings in this exhibit set forth appear on the journals and records of the respective houses.

Notwithstanding the failure of the Legislature of Tennessee to ratify the so-called Nineteenth Amendment by valid and lawful proceedings, the Governor of Tennessee, as your petitioners are informed and believe and therefore aver, on or about August 24th, 1920, transmitted to the Secretary of State of the United States a certificate describing the proceedings of the two houses up to that date, substantially as above set forth and stating that said Amendment had been ratified in manner and form as appears by the said official record of the proceedings, but said Governor did not certify that said Amendment was adopted by the Legislature of Tennessee according to the

provisions of the Constitution of the United States, as is required by Section 205 of the Revised Statutes of the United States.

On or about September 4th, 1920, the Governor of Tennessee transmitted a second certificate to the Secretary of State of the United States, containing a certified copy of the entries in the Journal of the House showing the action of said House as hereinbefore described, taken subsequently to August 23d, reconsidering and rejecting the resolution of ratification and expunging from its journal the record of pretended ratification by the quorumless House on August 21st, 1920.

4th December, 1920.—Appearance of Defendant by attorney.

Same day the Defendants, by their attorneys, filed the following Answer to the Petition:

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

To the Honorable the Judge of said Court:

Your respondents, J. Mercer Garnett, Frederick W. Beck, William J. Hogan, and Daniel Billmyer, constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of the City of Baltimore, answering the petition of Oscar Leser and others heretofore filed and exhibited against them herein, respectfully show unto your Honor:

I. That this Honorable Court is without jurisdiction to hear and determine the matters alleged in said petition, because to do so would be to deny full faith and credit in this State to the public Acts, Records, and Judicial Proceedings of other States, in violation of Section 1 of Article 4 of the Constitution of the United States, and to question the validity of an official act duly performed by the Secretary of State of the United States.

II. Your respondents, further answering, respectfully show that this Honorable Court is without jurisdiction to entertain said petition, because no application was ever made to your respondents to strike from the list of persons registered as qualified voters the names of the persons whom the petitioners have by their petition prayed this Honorable Court to strike from the register of voters of the Seventh Precinct of the Eleventh Ward of Baltimore City, nor either of them, nor was the registered address of either of said persons placed upon any list of the registered addresses of those persons registered as qualified voters in said precinct whom any one of the officers of registration suspected not to be qualified voters or against whom any voter of the said ward had

made complaint, nor was any other legal proceeding taken before your respondents, constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City, to prevent the registration of said persons or either of them in said precinct, or to strike the name of either of said persons from the list of those who had been registered as qualified voters in said precinct, nor was any hearing legally held before your respondents, constituting said Board, with reference to the right of said persons or either of them to register in said precinct or to have their names or either of their names upon the register of qualified voters in said precinct.

III. Your respondents reserving to themselves all right of demurrer to the said petition, and objection to the jurisdiction of this Honorable Court, both for the reasons above stated and for other reasons to be hereafter shown, further answering, say that they deny that the persons registered in said Seventh Precinct of said Eleventh Ward, as alleged in the first paragraph of said petition, are disqualified under the Constitution or the laws of the State of Maryland and of the United States of America to vote at any election hereafter to be held, but admit that the grounds of disqualification alleged by the petitioners were brought to the attention of said Board of Registry on the 12th day of October, 1920, as alleged in said petition, but your respondents deny that the grounds of disqualification alleged by said petitioners were valid.

IV. Further answering, your respondents, deny the allegations of fact made in the second, third and fourth paragraphs of said petition.

19 And having fully answered the said petition, your respondents prays that said petition may be dismissed.
And as in duty bound, etc.

ALEXANDER ARMSTRONG,

Attorney-General;

LINDSAY C. SPENCER,

Assistant Attorney-General,

Attorneys for Respondents,

Service of copy admitted this 3rd day of December.

W. L. MARBURY,

Attorney for Petitioners.

13th December, 1920.—Petition to Add Parties Defendants.

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

To the Honorable the Judge of said Court:

The petition of Caroline Roberts, Clara T. Waite, Josephine L. Chatard, Eugenia H. Parker, Madeline Le Moyne Ellicott, A. Page Reid, Margaret T. Carey, Anna W. Heath, Evelyn P. Lord, Annie Jantney, Mary W. Ramey, and Hattie M. Emmert, citizens and tax payers of the State of Maryland, and being the Officers and Directors of the Equal Suffrage League of Baltimore, Inc., a body corporate, duly incorporated under the laws of the State of Maryland, with the following declared object, viz:

"To promote the cause of equal suffrage and to effect the political enfranchisement of women."

20 By Jacob M. Moses, Maloy & Brady and Howell & Yost,
their attorneys,

Respectfully shows unto your Honor:

1. That your petitioners feel a special and lively interest in the above-entitled cause, and in the petition brought by Oscar Leser and others therein, inasmuch as by the said petition the validity of the Nineteenth Amendment to the Constitution of the United States and the right of female citizens to be registered as voters in the State of Maryland are attacked; that therefore your petitioners desire to be represented by counsel at the hearing of the above entitled cause and to be allowed to present arguments and briefs in opposition to the aforesaid petition of Oscar Leser and others.

2. That your petitioners bring this their petition with the full knowledge and consent of the Attorney-General of the State of Maryland, representing the defendants in the above-entitled cause.

Your petitioners, therefore, pray:

1. That your petitioners may be allowed to appear and be represented by counsel at the hearing of the above-entitled cause and to present arguments and briefs therein.

And as in duty bound, etc.

JACOB M. MOSES,
MALOY & BRADY,
HOWELL & YOST,
Attorneys for Petitioners.

STATE OF MARYLAND,

City of Baltimore, To wit:

I hereby certify, that on this 11th day of December, in the year 1920, before me the subscriber, a Notary Public, of the State of Maryland, in and for the City of Baltimore, aforesaid, personally appeared Madeline Le Moyne Ellicott one of the petitioners and made oath in due form of law that the matters and facts set out in the foregoing petition are true and bona fide.

21 As witness my hand and Notarial Seal.

JOHN McCULLOUGH,

Notary Public. [SEAL.]

Ordered as prayed this 13th day of December, 1920.

CHAS. W. HEUTSLER,

14th December, 1920.—Agreements of Counsel filed.

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

To the Honorable the Judge of said Court:

It is stipulated by counsel for the petitioners and the Attorney-General of Maryland, as counsel for the respondents in the above-entitled case, as follows:

1. That the Constitution of any State or any part of such Constitution may be read in evidence from any printed volume purporting to contain such Constitution and the said printed volume shall in this case be received as evidence of said Constitution without any further authentication of proof thereof. (Art. 35, Sec. 53, p. 984 Annotated Code of Maryland.)

2. That the decisions rendered by the Court of last resort of any State of the United States, may be read as evidence of the law of such state, from any printed volume purporting to contain such decisions.

3. That the Journals of the Senate and the House of West Virginia at the extraordinary session of 1920, may be read in evidence from the printed volume purporting to contain said Journals and that the Rules of the said Senate may be read in evidence from the printed pamphlet or pages purporting to contain the said rules. The same being identified by the initials of counsel for the petitioners and respondents.

4. That where the rules of any legislative body are offered in evidence and contain an incorporation by reference to rules of par-

liamentary procedure contained in other printed volumes or standard authorities, such as Reed's Rules of Order, or Jefferson's Manual, or Roberts' Rules of Order, the same may be read in evidence from any printed volume purporting to be a copy of such work.

The above stipulations are subject to the understanding that the right to object and except to the relevancy of any evidence offered in the case is hereby reserved.

W. L. MARBURY,
Attorney for Petitioners.
ALEXANDER ARMSTRONG,
Attorney for Respondents.

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry, etc.

It is hereby agreed and stipulated that Mercer Garnett et al., the respondents, may introduce in evidence copies bearing the certificate of the Secretary of State of the United States of the several resolutions and certificates heretofore sent by the Executives of the States of West Virginia, Tennessee and Connecticut, in relation to the suffrage Amendment to the Secretary of State of the United States of America, to have the same effect and import as if said certificates and
23 resolutions were now offered in evidence, it being the intent and purpose to agree to the use of said copies, but it being understood and agreed that all right of objection upon any other ground shall be and is hereby reserved, and that either party may offer copies certified as above of any other certificates or resolutions sent by any of said executives to the Secretary of State of the United States of America in relation to said alleged amendment, at any subsequent stage of the proceedings in this Court.

T. F. CADWALADER,
W. L. MARBURY,
Attorneys for Petitioners.
LINDSAY C. SPENCER,
GEO. M. BRADY,
Attorneys for Respondents.

December 14, 1920.

28th January, 1921.—Petition Dismissed. Opinion of Court thereon filed.

In the Court of Common Pleas of Baltimore City.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al.

Opinion.

HEUSLER, J.:

The petitioners in the above case being citizens, voters and taxpayers of the State of Maryland and members of the Board of Managers of the Maryland League for State Defense, "organized to oppose, by all lawful means, the ratification by the General-Assembly of
24 Maryland of the Woman Suffrage Amendment thereby to preserve for the people of Maryland the right which they have possessed since colonial days to determine for themselves who shall be entitled to vote at their own elections and thus preserve the essential feature of the sacred right of local government," in their petition filed in this case, for relief pray "that the names of Cecilia Street Waters and Mary D. Randolph be struck from the registry of voters of the Seventh Precinct of the Eleventh Ward of Baltimore City, as persons disqualified to vote."

These two names were on said registry books by virtue of the provisions of an amendment to the Constitution of the United States known as the Nineteenth Amendment, which reads as follows:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of sex.

"Sec. 2. The Congress shall have power to enforce this Article by appropriate legislation."

The object of the petition is to test the validity of this Nineteenth Amendment, the Maryland Constitution expressly limiting the right of suffrage to males,—and the following reasons are assigned:

1. "The said alleged amendment to the United States Constitution is not such an amendment as the Congress is authorized by Article 5 of the Constitution of the United States to propose to the Legislatures of the several States to be by them ratified in accordance with said Article 5, but is wholly outside of the scope and purpose of the amending power conferred upon Congress, subject to ratification by three-fourths of the State Legislatures, by the said Article;" and,

2. "That the said alleged Nineteenth Amendment to the Constitution of the United States was never in fact ratified by the Legislatures of three-fourths of the States, now composing the United States of America, the proclamation dated August 26, 1920, by the Honorable Bainbridge Colby, Secretary of State of the United States to the contrary notwithstanding."

25 At the outset of this opinion—the Court desires to repeat the statement made in the brief submitted by counsel for Caroline Roberts et al.: “the expediency or wisdom of extending the franchise to women; whether as a matter of fact the vote was desired by the women of the country as a whole; the fact that by the amendment a large class of women of undesirable character and race are enfranchised; and other similar questions are all foreign to this case. The only question at issue is as to the validity or invalidity of the Nineteenth Amendment.”

To evidence and Exhibits in evidence, tending to show the facts set out in the second reason, objection was made that same was incompetent, irrelevant and improper because this Court cannot and should not make such enquiry,—and by reference to and examination of legislative proceedings and Journals of the States of West Virginia and Tennessee,—ascertain and determine the fact whether or not those States have failed to ratify the Amendment.

The determination of the validity of ratification of Constitutional Amendments is a judicial function. Full faith and credit must be given to all legislative acts—but that means “the same and no more, to which they are entitled in the State whose acts they are.”

2 Tucker on Constitution, 626.

These legislative acts of West Virginia and Tennessee, as to their validity, have not been determined by the exercise of any local judicial function. The Courts of those States had the right to go behind the certificates, and if they do not or will not do so, any sister State has the same right. The evidence is legally admissible; its probative value and bearing on this proceeding; or its control and explanation by the other evidence submitted by the Respondents is another and different thing. Under the circumstances of this proceeding it seems manifestly proper and necessary to complete and fill out the record—so that further examination and ultimate adjudication may have access to and the benefit of all the evidence.

The fundamental question is set out clearly in the first reason:—
 26 “that it is not such an amendment as the Congress is authorized by Article 5 of the Constitution of the United States to propose to the Legislatures of the several States to be by them ratified in accordance with said Article 5, but is wholly outside of the scope and purpose of the amending power conferred upon Congress, subject to ratification, etc.”

Article 5 reads as follows:

“The Congress whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, which in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the

ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

This Article was one of the seven Articles which made up the original Constitution,—and which was ratified in convention by unanimous consent of twelve States present (Maryland being one) on September 17, 1787.

This Constitution was preceded by the following formal, solemn and well considered Preamble:

"We, the people of the United States, in order to form a more perfect Union, establish Justice, insure Domestic Tranquillity, provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty—to ourselves and our Posterity—do ordain and establish this Constitution for the United States of America."

By this Constitution, in accepted form, the Sovereign People of America spoke—and, in Article 5, the same people reserved the power to themselves, through the Congress, to propose Amendments to this Constitution, subject to the two provisos in said Article set out; (a) "that no amendment which may be made prior to the year 1808 shall in any manner affect the First and Fourth clauses in the

Ninth Section of the First Article;" and, (b) "that no State, without its consent, shall be deprived of its equal suffrage in the Senate"; and, in the same Article they set out the manner in which any proposed Amendments, through Congress, should be acted on by that Congress and the State Legislatures, to validate the amendment.

Two years and eight days thereafter—the First Congress, on September 25, 1789, proposed the first Ten Amendments to the Legislatures of the several States—and they were ratified by eleven States (Maryland responding quickly on December 19, 1789)—the Congressional Journal showing no action by Connecticut, Georgia and Massachusetts. These Ten Amendments constitute the National Bill of Rights. They provide for—freedom of religion, speech and press; the right of the people of a free State to keep and bear arms; the quartering of United States soldiers; the right of the people against unreasonable search and seizure; the right to answer only on presentment or indictment—the right of jeopardy and right of testimony—the right of life, liberty and property and the security of private property against public use; the right to speedy, public and jury trial and confrontation of witnesses; the right of trial by jury in civil cases; the right of protection against excessive bail or fines and cruel or unusual punishment—and finally, in Articles 9 and 10, the right to insist "that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

This Bill of Rights is called in the Preamble to the Ten Articles, "Articles in Addition to and Amendment of the Constitution of the United States of America—proposed by Congress and ratified by

the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution."

They were submitted to the States during a period of more than two years after Article 5 had been adopted; their pronouncement of rights is so searching and detailed; and the life, liberty and property of the sovereign people, and "the essential features of

28 local government"—and all the rights that flow therefrom—are so earnestly ascertained and jealously safeguarded,—that the conclusion is irresistible that the Article 5 was the subject of much earnest, honest, intelligent and painstaking examination and study upon the part of the Founders of the Government and their advisers—and they knew that Article and what it meant—and they let it stand unchanged, reserving in the provisos all they desired to reserve, and that was, (1) the right of any of the States to admit immigrants for a certain period of time, without the let or hindrance of Congress except a slight per capita tax not exceeding ten dollars; and, (2) no capitation or other direct tax to be laid unless in proportion to a certain census or enumeration, these two being the invitation to the world to come to the possibilities and blessings of the New Republic and absolutely beyond amendment prior to the year 1808. The other proviso of Article 5, unchanged from the beginning, declared "that no State without its consent should be deprived of its equal suffrage in the Senate."

What these words meant in 1787 they meant in 1789—and they have no different meaning now;—no amendment, without her consent, can deprive Delaware of her two United States Senators, and, no amendment without the consent of all the other States, can give more than two to Texas or New York.

This Court is of opinion that the power of amendment to the Federal Constitution is substantially unlimited, and agrees with Tucker, "that the only limitation upon the amending power is that with respect to equal suffrage in the Senate";

Tucker, Constitution of the United States, Vol. 1, 397-399; and is of opinion that the words—"equal suffrage in the Senate," has no meaning but the one above set out.

To resume and conclude this Court is of opinion—that the power to amend the Constitution of the United States granted by the Fifth Article thereof, is without limit, except as to the words, "equal suffrage in the Senate"; and those words have no other meaning than that hereinbefore announced; that by no implication can you read

29 a limit to that power;—and that the aforesaid Nineteenth Amendment does not in any way violate the guarantee contained in Sec. 4, Article 4 of the said Constitution, which provides that "the United States shall guarantee to every State in this Union a Republican Form of Government, etc."

The Court is further of the opinion from all the exhibits and other evidence submitted that there was due, legal and proper ratification of the Amendment by the required number of State Legislatures.

Accordingly all the instructions submitted will be refused, and an order signed dismissing the petition with costs.

28th January, 1921.—Exception to the ruling of the Court filed.

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

The Petitioners, upon the filing of the Opinion of the Court and his Honour's ruling refusing the prayers of the Petitioners, respectfully note an exception to the refusal of the said prayers by the Court and note an exception to the ruling in said Opinion that the said alleged Nineteenth Amendment to the Constitution of the United States is valid as a part of said Constitution.

THOS. F. CADWALADER,
GEORGE A. FRICK,
EVERETT P. WHEELER,
WM. L. MARBURY,

Attorneys for Petitioners.

30 And on 28th day of January, 1921, Plaintiffs' Order of Appeal filed.

17th February, 1921.—Bill of Exceptions filed.

Petitioner's Bill of Exception.

In the Court of Common Pleas.

OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

February 4, 1921.

At the trial of this case before his Honor, Judge Charles W. Heusler, in the Court of Common Pleas, the petitioners, to maintain the issues on their part, offered the following evidence:

WILLIAM P. WELLS, a witness of lawful age, being duly sworn, testified that he was clerk of the Supervisors of Election, and he thereupon, upon request, produced and identified the following books which were offered in evidence, to wit:

The original books of registry of the Seventh Precinct of the Eleventh Ward of Baltimore City, kept in duplicate, being the books of registry used in said precinct on the several days of regis-

tration and election provided by law during the months of September, October and November, 1920, of which books the only material parts are those contained on page 110 and page 84 respectively. Page 110 shows, in the respective columns as provided by law, the following entries concerning Cecelia Street Waters, as read by the witness: "824 North Eutaw Street, second floor; Waters, Cecelia Street, Democrat; sworn; 69; Maryland; white; nine years; nine years; 69 years; native; yes; 1920; October 12. The lady signed her name. Shows that she did not vote at the election."

Under the head of "Remarks," admitted over the objection of the respondent, appear the words: "Right to register challenged by Oscar Leser as per memorandum. Challenge overruled by judges."

There was a formal memorandum filed with the Board of Registry and returned to the Supervisor's office.

The witness testified that he had made a thorough search for this memorandum but that it had been mislaid and he was unable to discover it.

On page 84 the following entries appear concerning Mary D. Randolph, as read by the witness: "331 W. Biddle Street, second floor; Randolph, Mary D.; Republican; sworn; 24; Maryland; colored; three years; three years; 24 years native; yes; 1920; October 12. Signature, Mary D. Randolph. This woman voted."

Under the column entitled "Remarks," appears the entry: "Right to register challenged by Oscar Leser as per memorandum filed. Overruled by judges."

Formal memorandum was similarly filed in this case with the Board of Registry and returned to the Supervisor's office. Witness testified that he had made a search for same but was unable to discover it.

The respondent moved to strike out the answer to the question "Under the head of remarks, what does that book show?" which had been answered as above. The motion was overruled.

Whereupon, OSCAR LESER, a witness of lawful age, produced and duly sworn, testified as follows:

"I am a citizen of the State of Maryland and resident of the City of Baltimore, and am one of the petitioners in this proceeding. I am acquainted with all the petitioners whose names appear in this petition. I am a member of the Board of Managers of the Maryland League for State Defense, and the other petitioners are also members of that Board. This League is an unincorporated association of the citizens of this State organized in the year 1919 with the declared object which is fully stated in the petition. I appeared before the Board of Registry of the Seventh Precinct of the Eleventh Ward on October 12, 1920.

"Q. What did you do there?"

(Objected to; objection overruled.)

"A. I appeared before the Board of Registry accompanied by Mr. Cadwalader, one of the counsel for the League, in order to challenge the right of a woman to register. I had no particular designs against any special lady; was willing to take chances on who should come in. Luck would have it that Miss or Mrs., I do not know which, Cecilia Street Waters made her appearance. As she offered to go through the form of registration I addressed the Board of Registry and challenged their right to register her and her right to be registered.

"(Mr. Spencer:) We object to the statement of the witness and move to strike it out.

"(Objection overruled.)

"(The Witness:) I stated briefly the reasons which were also embodied in a written memorandum which I asked the registrars to file of record.

"(Mr. Spencer:) We object to this.

"(Objection overruled.)

"(The Witness:) The Board conferred and announced a decision overruling my challenge and allowed the lady to be registered.

"(Mr. Spencer:) We move to strike out the answer.

"(Motion overruled.)

"(The Witness:) They made an entry on the record of their action. Subsequently I went through substantially the same proceeding with Mary D. Randolph, a young colored woman.

"(Mr. Spencer:) We move to strike out the answer.

33 "(Motion overruled.)

"(The Court:) With the same result, Judge Leser?

"(The Witness:) With the same result and the same entries on the record.

"(Mr. Spencer:) We move to strike out that answer.

"(Motion overruled.)

"Q. Are the entries made by the registrars on the record the same that have been read to the Court by the previous witness?

"A. They are.

"Q. Did you see them made?

"A. I did.

"(Mr. Spencer:) We move to strike out the last two questions and answers.

"(Motion overruled.)

"Q. Were these two female respondents, Miss Waters and Mary Randolph, present when you made the challenge?

"A. Yes.

"(Mr. Spencer:) We move to strike out the answer.

"(Motion overruled.)

"Q. You heard Mr. Wells' testimony as to his inability to locate the original memorandum; I now show you the papers filed with the petitioner marked Exhibit- A and B respectively purporting to be copies thereof, and I will ask you to look at them and state whether or not they are as a matter of fact copies of the same memoranda that you filed as you have stated?

"A. They are exact copies.

"(Mr. Cadwalader:) I offer them in evidence.

"(Objected to; objection overruled.)

"(Papers referred to, having been offered in evidence, were marked Petitioner's Exhibits 1 and 2.)

"(Cross-examined waived.)"

The petitioners here offered a stipulation of counsel in the following words, to wit:

34

"In the Court of Common Pleas.

"OSCAR LESER et al.

VS.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City.

"It is stipulated by counsel for the petitioners and the Attorney General of Maryland, as counsel for the Respondents in the above entitled case, as follows:

"1. That the Constitution of any State or any part of such Constitution may be read in evidence from any printed volume purporting to contain such Constitution and the said printed volume shall in this case be received as evidence of said Constitution without any further authentication or proof thereof. (Art. 35, Sec. 53, pg. 984, Annotated Code of Maryland.)

"2. That the decisions rendered by the Court of last resort of any State of the United States, may be read as evidence of the law of such State, from any printed volume purporting to contain such decision.

"3. That the Journals of the Senate and the House of West Virginia at the extraordinary session of 1920, may be read in evidence from the printed volume purporting to contain said Journals and that the Rules of the said Senate may be read in evidence from the printed pamphlet or pages purporting to contain the said rules. The same being identified by the initials of counsel for the Petitioners and Respondents.

"4. That where the rules of any legislative body are offered in evidence and contain an incorporation by reference to rules of parliamentary procedure contained in other printed volumes or standard authorities, such as Reed's Rules of Order, or Jefferson's Manual, or Robert's Rules of Order, the same may be read in evidence from any printed volume purporting to be a copy of such work.

"The above stipulations are subject to the understanding that the right to object and except to the relevancy of any evidence offered in the case is hereby reserved.

(Signed)

W. L. MARBURY,

Attorney for Petitioners.

(Signed)

LINDSAY C. SPENCER,

Attorney for Respondents."

The following further stipulation, signed by counsel in the case was also filed as a part of the record:

"In the Court of Common Pleas.

"OSCAR LESER et al.

vs.

"J. MERCER GARNETT et al., Constituting the Board of Registry, etc

"It is hereby agreed and stipulated that Mercer Garnett et al., the respondents, may introduce in evidence copies bearing the certificate of the Secretary of State of the United States of the several resolutions and certificates heretofore sent by the Executives of the States of West Virginia, Tennessee and Connecticut, in relation to the Suffrage Amendment to the Secretary of State of the United States of America, to have the same effect and import as if said certificates and resolutions were now offered in evidence, it being the intent and purpose to agree to the use of said copies, but it being understood and agreed that all right of objection upon any other ground shall be and is hereby reserved, and that either party may offer copies certified as above of any other certificates or resolutions sent by any of said executives to the Secretary of State of the United States of America in relation to said alleged amendment, at any subsequent state of the proceedings in this Court.

36

(Signed)

W. L. MARBURY,

(Signed)

T. F. CADWALADER,

Attorneys for Petitioners.

(Signed)

LINDSAY C. SPENCER,

Attorney for Respondents."

"December —, 1920."

Messrs. Moses and Brady appearing as amici curiæ stated that there was no objection on their part to the stipulations.

The petitioners thereupon offered in evidence, over the objection of the respondents, the following parts of the Constitution of West Virginia, to wit, Article 6, Section 24, and Article 6, Section 12, which the respondent then moved to strike out and the motion was overruled.

The sections are as follows:

"Article 6, Section 24: A majority of the members elected to each House of the Legislature, shall constitute a quorum. But a smaller number may adjourn from day to day, and shall be authorized to compel the attendance of absent members, as each House may provide. Each House shall determine the rules of its proceedings and be the judge of the elections, returns and qualifications of its own members. The Senate shall choose, from its own body, a President; and the House of Delegates, from its own body, a Speaker. Each House shall appoint its own officers, and remove them at pleasure. The oldest delegate present shall call the House to order, at the opening of each new House of Delegates, and preside over it until the Speaker thereof shall have been chosen and have taken his seat. The oldest member of the Senate present at the commencement of each regular session thereof, shall call the Senate to order, and preside over the same until a President of the Senate shall have been chosen, and have taken his seat."

37 Article 6, Section 12: "No person shall be a Senator or Delegate who has not for one year next preceding his election, been a resident within the District or county from which he is elected; and if a Senator or Delegate remove from the District or county for which he was elected, his seat shall be thereby vacated."

The petitioners then offered, over the objection of the respondents, such parts of the Constitution of Tennessee as might at any stage of the proceedings be deemed relevant, to wit, Article 2, Section 32, as follows:

"Article II, Section 32. Amendment to Constitution of the United States: No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such convention or general assembly shall have been elected after such amendment is submitted."

And also Section 11:

"Section 11. Powers of Each House: Quorum: Adjournment from Day to Day: The Senate and House of Representatives, when assembled, shall each choose a Speaker and its other officers; be judges of qualification and election of its members, and sit upon its own adjournment from day to day. Not less than two-thirds of all the members to which each House shall be entitled shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members."

Also Section 5 of Article II, showing that the House of Representatives of Tennessee cannot consist of more than 99 members. (See Sections 123 to 127, inclusive, of the Code of Tennessee of 1917, fixing the membership at 99.)

And also Section 12 of Article II of the Constitution of Tennessee by which each House of the Legislature is given the power to determine the rules of its own proceedings.

The above Sections were objected to by the respondents when offered and the objection overruled.

38 The petitioners also offered in evidence Article 2, Section 3, of the Constitution of Missouri, which is as follows:

"Article 2, Section 3: Local self-government not to be impaired.—That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible union, and were intended to co-exist with it, the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State."

This offer was objected to by the respondents and the objection overruled.

The petitioners also offered in evidence generally, over the objection of respondents, those parts of the Constitutions of those States which have gone through the form of ratifying the Nineteenth Amendment, so-called, or which are claimed to have gone through the form of ratifying that amendment, which provide the method of their own amendment, which method in each case requires among other things a ratification of the proposed amendment by vote of the qualified electors of such State.

The petitioners then offered in evidence the following transcript of the House Journals of the extraordinary session, Sixty-first General Assembly, State of Tennessee, relating to Senate Joint Resolution No. 1, relative to ratifying the Nineteenth Amendment to the Constitution of the United States.

Also bound therewith transcript of Senate Journals at the same session of the General Assembly relating to the same matter. Both transcripts were certified as prescribed by law for the proof of public acts and records of any state of a non-judicial nature in the courts of another state. (They were objected to by respondents as irrelevant but the objection was overruled.)

39 *Transcript of House Journals, Extraordinary Session, 61st General Assembly, State of Tennessee, on Senate Joint Resolution No. 1, Relative to Ratifying the 19th Amendment to the Constitution of the United States.*

Monday, August 9, 1920.

First Day.

The Governor having issued his proclamation convening the 61st General Assembly in Extraordinary Session.

The House met at the Capitol at 12.00 o'clock M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by Rev. R. V. Cawthon.

Mr. Speaker Walker directed the Clerk to read the Proclamation of the Governor convening the General Assembly in Extraordinary Session which, on motion, was ordered spread on the Journal and is as follows:

Proclamation.

To the Members of the Sixty-first General Assembly of the State of Tennessee:

You are hereby called to meet in Extraordinary Session at the State Capitol in Nashville, Tennessee, at noon, on Monday, August 9, 1920, for the purpose of taking action upon the following subjects deemed of sufficient importance to require immediate attention, to wit:

1. To take action upon the amendment of the Constitution of the United States, proposed by the Congress, giving women full right of suffrage, being the proposed Nineteenth Amendment to the Federal Constitution.

* * * * *

Only matters of compelling urgency have been included in this call. It is less than five months until the Legislature will convene in regular session, at which time other matters, both general and special, which have been strongly urged upon me, can be taken up at a time when they may receive full consideration. The pledges made in the Democratic platform not hereinbefore specifically mentioned are in no sense ignored, but will be fully redeemed by the incoming Legislature.

In Testimony Whereof, I have hereunto set my hand and caused the great seal of the State to be affixed at the Capitol at Nashville, on Saturday, August 7, 1920.

A. H. ROBERTS,
Governor.

IKE B. STEVENS,
Secretary of State.

Tuesday, August 10, 1920.

Second Day.

The House met at 10.00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 86 members were found to be present.

The absent members were: Messrs. Bell, Fitzhugh, Francisco, Green, Harris (of Wilson), Norvell, Swink, Wilson and Wolfenbarger, who were excused.

On motion the reading of the Journal was dispensed with.

41

Sworn In.

The following Representatives-elect presented their certificates and were duly sworn in by Mr. Speaker Walker:

Sullivan County, T. A. Dodson.

26th Floterial District:

Lauderdale and Tipton Counties, W. A. Shoaf, Jr.

9th District:

Bradley and Polk Counties, J. H. Simpson.

Introduction of Resolutions.

By the Shelby Delegation—House Joint Resolution No. 1—Relative to the 19th Amendment.

Under the rules the Resolution lies over.

Wednesday, August 11, 1920.

Third Day, Afternoon Session.

The House met at 2.00 P. M. and was called to order by Mr. Speaker Walker.

On motion the roll call was dispensed with.

Resolutions Lying Over.

House Joint Resolution No. 1—Relative to the 19th Amendment.

On motion of Mr. Riddick the Resolution was referred to the Committee on Constitution Convention and Amendments.

Monday, August 16, 1920.

Eighth Day.

The House met at 2:00 P. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

42 On a call of the roll 98 members were found to be present.

The absent member was Mr. Harris (of Wilson).

On motion the reading of the Journal was dispensed with.

Message from the Senate.

Mr. Speaker:

I am directed to transmit to the House, Senate Joint Resolution No. 4—Relative to the Nineteenth Amendment to the Constitution, adopted for concurrence.

CARTER,
Clerk.

Tuesday, August 17, 1920.

Ninth Day.

The House met at 10.30 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 96 members were found to be present.

The absent members were: Messrs. Brooks, Harris (of Wilson) and Rowan, who were excused.

On motion the reading of the Journal was dispensed with.

Reports from Standing Committees.

Committee on Constitutional Conventions and Amendments.

Mr. Speaker:

Your Committee on Constitutional Conventions and Amendments beg leave to report as follow:

43 (1) We have been shown the opinions of the Attorney General of Tennessee, the Solicitor General of the United States and of numerous other lawyers all holding that Section 32 of Article 2 of the Constitution of Tennessee was abrogated before its enactment by the 5th Article of the United States Constitution and was never of any legal force and effect. This special provision of our Tennessee Constitution is the only limitation upon the power of the Legislature to pass the proposed resolution which has ever been suggested and as it is now out of the way, we report that the Legislature has the perfect right and the full power to adopt House Joint Resolution No. 1, ratifying the proposed 19th Federal Amendment, giving suffrage to women, if such is its desire.

(2) As to the wisdom and policy of ratifying the proposed 19th Amendment, in our opinion this is no longer an open question for

either Democrats or Republicans. Upon full consideration, the State and National Conventions of both Parties have made the ratification of this Amendment a vital part of the political creed of both the great parties. Accordingly, it seems to us to be the plain duty of all loyal Democrats and of all loyal Republicans to respect and obey the platform declarations of their respective Parties, and to enact them into law as soon as this can legally be accomplished.

(3) As to the claim that members of this Legislature violate their official oaths and stifle the voice of their consciences by voting for the proposed resolution, we recognize the fact that each man must of necessity be the guardian of his own conscience. However, speaking with full respect for our consciences, and with absolute regard for our official oaths, we feel that we are entirely free to support the proposed Resolution. We go further and unhesitatingly declare that as our official oaths require us to support the Constitution of the United States as well as that of Tennessee, we would be violating that oath if we refused to accord the former that supremacy, in case of conflict, to which it is entitled by its own express declaration upheld by repeated decisions of every Court, State and Federal, of this great Nation. That there is such a conflict was necessarily decided by the Supreme Court of the United States in the Noted Ohio Referendum case of *Hawk vs. Smith*, Secretary.

44 (4) To sum up what we have said: We report that, in our opinion, the members of this House have the perfect right and full power to pass House Joint Resolution No. 1 and that its passage is simply the performance of solemn platform promises made to the people of this State and the United States by both great parties and indeed by every other party.

Moreover, we take great pride in the fact that, to Tennessee has been accorded the signal distinction of passing a Resolution which will secure the final adoption of the 19th Federal Amendment, giving to our mothers, wives, daughters, sisters and sweethearts, a precious right which they have been so long unjustly denied.

We heartily recommend the adoption of House Joint Resolution No. 1 ratifying the 19th Federal Amendment giving suffrage to women.

T. K. RIDDICK,
JOS. HANOVER,
JOE HARRIS,
BROWN DAVIS,
R. W. BRATTON,
T. O. SIMPSON,
U. S. G. ELLIS,
JOE F. ODLE,
J. F. McMURRAY,
G. H. KEATON.

Resolutions Lying Over.

Senate Joint Resolution No. 1.—Relative to ratifying the 19th Amendment.

Pending consideration of the Resolution (Mr. Overton presiding) Mr. Walker's motion to adjourn until tomorrow at 10.00 a. m. prevailed by the following vote:

Ayes	52
Noes	44

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Burn, Carter, Carr, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Hickman, Jackson, Keisling, Leath, Long, Martin (of Hamilton), McCalmann, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Phelan, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Travis (of Franklin), Turner, Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Wonnack and Mr. Speaker Walker—52.

Representatives voting no were: Messrs. Anderson, Bell, Brooks, Canale, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Forsythe, Griffin, Hanover, Harris (of Knox), Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Light, Longhurst, Luther, Lynn, Martin (of Washington), Miller, Morgan, Moose, Odle, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Thronesberry, Traves (of Henry), Tucker and Wade—44.

Wednesday, August 18, 1920.

Tenth Day.

The House met at 10.00 a. m. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. E. V. Cawthon.

On a call of the roll 96 members were found to be present.

The absent members were: Messrs. Brooks, Harris (of Wilson) and Rowan, who were excused.

On motion the reading of the Journal was dispensed with.

Unfinished Business.

Senate Joint Resolution No. 1.—Relative to ratification of 19th Amendment.

Mr. Walker (Mr. Overton presiding) moved that the Resolution be tabled.

The motion failed for want of majority by the following vote:

Ayes	48
Noes	48

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Burn, Carter, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall,

Harville, Hayes, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronesherry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Wonnack and Mr. Speaker Walker—48.

Representatives voting no were: Messrs. Anderson, Bell, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griflin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Loughurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swing, Tarrant, Travis (of Henry), Tucker, Turner and Wade—48.

Thereupon the Resolution was concurred in by the following vote:

Ayes	50
Noes	46

Representatives voting aye were: Messrs. Anderson, Bell, Burn, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griflin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Loughurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner, Wade and Mr. Speaker Walker—50.

Representatives voting no were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, 47 Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronesherry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger and Wonnack—46.

Explanations.

The following explanation was made by Mr. Cassady:

Explanation by J. E. Cassady, Joint Representative of Knox and Loudon Counties, of his vote on Resolution ratifying the 19th Amendment to the Constitution:

Mr. Cassady said:

"Mr. Speaker:

It is my opinion that Article 2, Section 32, Tennessee Constitution, precludes me from voting for the ratifying the proposed 19th Amendment of our Federal Constitution. The two Constitutions, Federal and State, do no conflict, but construed together, under the rules of law required in construing two or more instruments together, so that they should both be maintained and preserved, if possible, that neither shall give way to the other, if both can be followed, and this question, as I see it, should be passed until the meeting of the Legislature, to be elected in November, 1920.

If this view were out of the way, I doubt the wisdom of the proposed Amendment. I am unwilling to place the burden, resulting from the ratification of this Amendment, upon the women of the country—paying poll tax, working on public roads, going to war, fighting side by side with men, which this Amendment carries. All such burdens I am unwilling to place on the women of the State, and all this must follow ratification.

Aside from this, ratification means to double the political power of the city and in proportion, lessen the political power of the country. Being from the country, as I am, I shall stand for the country people, where they go I follow, their people are my people, their God my God, and now being forced to vote I vote No, if I perish, I perish.

J. E. CASSADY."

The following explanation was offered by Mr. Hall.

(1) I am of opinion that under the Constitution of Tennessee, the present Legislature has no right or authority to act upon said amendment in any way. I see no conflict between our Constitution and that of the Federal Constitution, and so believing, I feel it my duty to maintain inviolate the oath I took to support the Constitution of our own State.

(2) But as the ratification of said amendment is treated as properly before this House for consideration, I vote for its rejection. I am of opinion that the question of suffrage should be dealt with solely by the States and not by way of Federal Amendment. I am unwilling to become a party to a measure that will impose woman suffrage upon other States that have emphatically decided that they do not want it; and further, I refuse to endorse a measure that will deprive the States of this Union of the right to regulate their own internal affairs, as will result from the adoption of the Nineteenth Amendment.

(3) I am convinced that a majority of the good women of Tennessee are against woman suffrage, and will resent the conferring of this privilege and duty against their wills.

(4) Lastly, I cannot give my approval to a resolution that will radically change our form of government and our own Constitu-

tion and that of the Federal Government, and bring about amendments to both instruments, without an opportunity of ascertaining the will of the people.

For the reasons above stated I vote No on this Resolution, the 19th Amendment.

F. S. HALL.

Mr. Walker (Mr. Overton presiding) changed his vote from "No" to "Aye" and entered a motion on the Journal to reconsider.

49

Saturday, August 21, 1920.

Thirteenth Day.

The House met at 10:00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

Mr. Riddick moved that the call of the roll be dispensed with. The motion prevailed.

On motion the reading of the Journal was dispensed with.

Mr. Montgomery made the point of order that no quorum was present and demanded a roll call.

On a call of the roll the following members were found to be present:—Messrs. Anderson, Bell, Bond, Brooks, Burn, Canale, Carr, Cassady, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Forsythe, Foster, Frogge, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), Martin (of Hamilton), McCalman, Miller, Montgomery, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Thornesberry, Travis (of Henry), Tucker, Turner, Wade and Mr. Speaker Walker—59.

Mr. Odle moved that the Speaker prepare a list of the absentees and give same to the Sergeant-at-Arms with the request that he go out and arrest any and all absent members and bring them into the House.

Before the motion was put Mr. Speaker Walker announced under the rules of the House such action on his part was necessary and instructed the Sergeant-at-Arms to secure a list of the absent members and if possible bring the members to the House.

On motion of Mr. Riddick at 10:30 A. M. the House recessed for one hour.

50

At the expiration of the recess the House was called to order by Mr. Speaker Walker.

Expunged by Order of the House Tuesday, August 31, 1920.

Mr. Riddick offered the following written motion:

Mr. Speaker: I call from the Journal the motion to reconsider Senate Joint Resolution No. 1.

Mr. Speaker Walker ruled the motion out of order for the following reasons:

1st. Because the roll call shows no quorum present.

Section 11 of Article II of the Constitution of the State provides in part: "Not less than two-thirds of all the members to which each House shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized by law to compel the attendance of absent members."

2nd. Because the Attorney-General of the State has held that it was only necessary for a majority of the members present constituting a quorum to ratify the 19th Amendment. If it requires a quorum to pass on the question of ratification, certain it is that a quorum must be present to reconsider.

3rd. State of Tennessee.

To A. H. Roberts, Governor of the State of Tennessee; Ike B. Stevens, Secretary of State of the State of Tennessee; A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee; Seth Walker, Speaker of the House of Representatives of the State of Tennessee, and Their Counselors, Attorneys, Solicitors and Agents, and Each and Every One of Them, Greeting:

Whereas, in a certain suit instituted in Part 2 of our Court of Chancery at Nashville, by C. Runcie Clements, Rufus E. Fort, Edward Buford, Dudley Gale, James A. Yowell, A. S. Warren and

George Washington, complainants, against A. H. Roberts, 51 Ike B. Stevens, A. L. Todd and Seth Walker, defendants, the complainants having obtained from Honorable E. G. Langford, a fiat for a writ of injunction to enjoin defendants A. H. Roberts, Governor of the State of Tennessee, Ike B. Stevens, Secretary of State, A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee, and Seth Walker, Speaker of the House of Representatives of the General Assembly of the State of Tennessee, and each of them, from making, signing or issuing any proclamation, declaration, resolution or certificate, declaring that the State of Tennessee has constitutionally and legally adopted the proposed Nineteenth Amendment to the Constitution of the United States, and from taking any official action, with reference to the illegal action of the special session of the General Assembly of the State of Tennessee purporting to ratify and adopt said Nineteenth Amendment to the Constitution of the United States; and

The complainants having executed the bond required by the said fiat:

We, therefore, in consideration of the premises aforesaid do strictly enjoin and command you, the said A. H. Roberts, Ike B. Stevens, A. L. Todd and Seth Walker, in their official capacities—set forth above, and all and every person before mentioned, under the penalty prescribed by law, of your and every of your goods, lands, tenements, to be levied to our use, and that you and every of you do absolutely desist from doing any of the things above forbidden, restrained and enjoined—until hearing of this cause in our said Courts of Chancery.

Witness, Joseph R. West, Clerk and Master of our said Court, at office, the first Monday in April, in the year of our Lord, 1920, and in the 144th year of our Independence.

(Signed)

JOSEPH R. WEST,

Clerk and Master,

By C. H. SWANN,

Deputy Clerk and Master.

52 Expunged by order of the House Tuesday, August 31, 1920.

Mr. Riddick appealed from the decision of the Chair.

The Chair (Mr. Odle presiding) stated that the question was whether or not the Chair should be sustained in its ruling.

On a call of the roll of the House refused to sustain the decision of the Chair by the following vote:

Ayes	8
Noes	49
Present and not voting	1

Representatives voting Aye were:—Messrs. Bond, Boyer, Cassidy, Forsythe, Frogge, Martin (of Hamilton), Montgomery and Thronesberry—8.

Expunged by order of the House Tuesday, August 31, 1920.

Representatives voting No were:—Messrs. Anderson, Bell, Brooks, Burn, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), McCalmann, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphrey), Stovall, Swink, Tarrant, Travis (of Henry), Tucker and Wade—49.

The representative present and not voting was Mr. Speaker Walker—1.

Mr. Riddick offered the following written motion:

Mr. Speaker:

I move you that the House now reconsider its action in concurring in the adoption of Senate Joint Resolution No. 1.

53 Mr. Walker (Mr. Odle presiding) made the point of order that no quorum was present and demanded a roll call.

The Chair (Mr. Odle presiding) stated that he would first have a roll call on Mr. Riddick's motion and after that was disposed of would order a roll call on the demand of Mr. Walker that a quorum was not present.

Mr. Walker again demanded a roll call on the point of order that no quorum was present.

The Chair (Mr. Odle presiding) stated that there was a motion before the House and that a roll call on Mr. Walker's demand that no quorum was present would be ordered immediately after the motion of Mr. Riddick was disposed of.

Expunged by order of the House Tuesday, August 31, 1920.

Thereupon the motion of Mr. Riddick that the House reconsider its action in concurring in and adopting Senate Joint Resolution No. 1 failed by the following vote:

Ayes	0
Noes	49
Present and not voting	9

Representatives voting no were: Messrs. Anderson, Bell, Brooks, Burn, Canale, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), McCallman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner and Wade—49.

Representatives present and not voting were: Messrs. Bond, Boyer, Cassidy, Forsythe, Frogge, Martin (of Hamilton), Montgomery, Thornesberry and Mr. Speaker Walker—9.

54 Mr. Walker (Mr. Odle presiding) made the point of order that Mr. Odle was only acting as Speaker by his request and was therefore enjoined from putting any motion before the House.

Expunged by order of the House Tuesday, August 31, 1920.

Mr. Riddick offered the following written motion:

Mr. Speaker: I move you that the Clerk of this House, be, and he is hereby instructed to transmit to the Senate through the ordinary procedure Senate Joint Resolution No. 1.

On a vive voce vote the Chair (Mr. Odle presiding) declared the motion carried.

On motion of Mr. Riddick the House adjourned until 3:00 P. M. Monday.

Tuesday, August 31, 1920.

Twenty-Third Day.

The House met at 10:30 A. M. and in the absence of Mr. Speaker Walker was called to order by Chief Clerk Green.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 48 members were found to be present.

The absent members were: Messrs. Bell, Boyd, Boyer, Bratton, Canale, Carter, Cassidy, Cheek, Cole, Crawford (of Fayette), Davis, Dunlap, Forsythe, Francisco, Frogge, Gillbreath, Hall, Harris (of Wilson), Harville, Hayes, Howard, Jackson, Keisling, Long, Luther, Martin (of Washington), McCalman, McMurray, Miller, Millican, Moore, Norvell, Oldham, Rowan, Rucker, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—51.

55 On motion of Mr. Keaton the House stood at ease until 2:00 P. M. today.

At the hour of 2:00 P. M. the House was called to order by Mr. Speaker Walker.

On a call of the roll 91 members were found to be present.

The absent members were: Messrs. Canale, Davis, Harris (of Wilson), Luther, Martin (of Washington), Miller, Rowan and Sipes.

On motion the reading of the Journal was dispensed with.

Mr. Hall offered the following written motion:

Mr. Speaker: I move that each and every motion and proceeding appearing on pages 237, 238, 239, 240, 241, 242 of the Journal of the Lower House of Tennessee of the 61st General Assembly in extraordinary session assembled had on August 21, 1920, save and except the roll call showing no quorum to be present and the points of order made and the rulings thereon be expunged from the Journal.

Mr. Riddick made the following points of order:

Mr. Speaker: I rise to a parliamentary inquiry and ask: Is a motion in order which proposes to reconsider Senate Joint Resolution No. 1, which was concurred in and adopted by the House of Representatives on Wednesday, August 18, 1920, by a vote of 50 for and 46 against? I make the point of order that the action of this House in concurring in and adopting said Resolution cannot now be reconsidered, because:

1. By the concurrence in and adoption of said Joint Resolution the proposed Amendment to the Constitution of the United States therein embodied, was ratified by the State of Tennessee and the power and authority of this House over said Resolution was ipso facto terminated.

2. The Legislature of Tennessee derives its power to act upon a proposed amendment to the Constitution of the United States from that Constitution, Article V thereof, and from that only.

56 So when a Legislature of a State ratifies a proposed amendment to said Constitution, its action is final, and this power so given by the Constitution of the United States cannot be restricted, modified or enlarged, and no Legislature can, nor can this House of Representatives, provide any rule of procedure, or rule of action which will or can in any manner rescind, reconsider or affect the action of the Legislature after a proposed constitutional amendment has been ratified.

3. In acting upon, concurring in and adopting said resolution this Legislature was engaged not in a legislative act, but was performing a political act and duty for the State of Tennessee, and the rules of this House cannot be applied to, or in any manner govern or control the action of this body in acting upon a proposed amendment to the Constitution of the United States.

4. Rule 31 under which it is sought to maintain or bring forward the proposed motion to reconsider is applicable to questions of legislation only and not political questions, and this appears from the rule itself. This body is without power to make a rule which can affect or control in any way the action of this House in acting upon a proposed amendment to the Constitution of the United States.

5. This House of Representatives, by the concurrence in and adoption of said Joint Resolution, ratified said proposed amendment to the Constitution of the United States for the State of Tennessee and this body is without power or authority to rescind, reconsider or repudiate the affirmative action it has taken.

6. This House has already, on Saturday, August 21, 1920, by a vote of 50 to nothing, refused to reconsider its action concurring in Senate Joint Resolution No. 1, and directed that said Resolution be returned to the Clerk of the Senate, which was accordingly done. Having parted with the possession of said Resolution, the same is

now beyond its control, and no action the House could take would affect it in any way whatsoever.

7. In adopting the motion to concur in Senate Joint Resolution No. 1, this House was not legislating, but helping to cast the vote of Tennessee on the Nineteenth Federal Amendment giving suffrage to women, and that vote having now been cast, counted, and the result announced, Tennessee can vote no more.

Mr. Speaker Walker overruled the points of order stating that at present they were premature.

Mr. Odle made the following points of order:

I make the point of order that this House cannot now consider Senate Joint Resolution No. 1, ratifying the Nineteenth Amendment to the Constitution of the United States—Because—

1. Said Joint Resolution is not in the actual possession of this House, and the Clerk of the House cannot produce it for any action thereon.

2. Under Rule 31, the Resolution passed to the Senate when the time in which it could be reconsidered had elapsed.

3. The House by a vote of fifty members declined to reconsider said Resolution and directed the Clerk of this House to transmit it as concurred in, to the Senate.

4. Said Joint Resolution is not the exercise of a legislative but of a political function and when passed cannot be reconsidered.

Mr. Speaker Walker overruled the points of order stating that at present they were premature.

Thereupon the motion of Mr. Hall prevailed by the following vote:

Ayes	47
Noes	37
Present not voting.....	6

Representatives voting Aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Cheek, Cole, Crawford (of Bedford), Crawford (of Fayette), Dunlap, Forsythe, Francisco, Grogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican Montgomery Moore, Norvell Oldham, Overton, Rucker, Russell, Sharpe, Skidmore, Smith, Story, Swift, Thornesberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—47.

Representatives voting No were: Messrs. Brooks, Burn, Carr, Dedson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Hickman, Jeter, Keaton, Larsen, Leath, Light, Longhurst, Lynn, McCalman, Morgan, Moose, Odle, Phelan, Phillips (of Madison), Reector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys),

reys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner and Wade—37.

Representatives present and not voting: Messrs. Anderson, Bell, Harris (of Knox), Johnson, Kahn and Phillips (of Hawkins)—6.

Explanations.

My reason for answering present and not voting is—that we may get rid of this question and get down to business and finish up some needed legislation which cannot be done while this question is still in the shape it is. I am satisfied the Amendment has been passed and settled and further action by this body will avail nothing.

JOE HARRIS.

Explanation of Present and Not Voting—Ernest S. Bell.

Mr. Speaker: I am not voting for the reason that I believe the matter is beyond the jurisdiction of this body. The Secretary of State has issued his proclamation declaring that Tennessee has ratified the 19th Amendment; that it is now a part of the Federal Constitution and is the supreme law of the land. Therefore, I do not believe that this body has a right to act further on the matter. For that reason I refuse to vote or participate in further action.

ERNEST S. BELL.

Mr. Hall moved that Senat- Joint Resolution No. 1 be supplied and that the supplied copy be spread upon the Journal.

59 The motion prevailed and the Resolution is as follows:

Senate Joint Resolution No. 1.

"A Joint Resolution ratifying a proposed Amendment to the Constitution of the United States, providing that the right of citizens of the United States to vote, shall not be denied or abridged by the United States or by any State on account of sex, and providing further that Congress shall have power to enforce this article by appropriate legislation.

"Whereas, Both Houses of the Sixty-sixth Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, passed a resolution submitting to the several States a proposition to amend the Constitution of the United States, a certified copy of which has been received by the Governor of the State of Tennessee, from the Secretary of State of the United States, as required by law, and by him transmitted to the General Assembly, the same being in the following words, to wit:

"Sixty-sixth Congress of the United States of America, at the first session, begun and held at the City of Washington, on Monday, the Nineteenth day of May, One Thousand Nine Hundred and Nineteen.

"Joint Resolution proposing an amendment to the Constitution extending the right of suffrage to women.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following Article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States,

Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

60 "Congress shall have power to enforce this Article by appropriate legislation."

F. H. GILLETTE,

Speaker of the House of Representatives,

THOS. R. MARSHALL,

Vice-President of the United States and President of Senate.

"Be it resolved by the Senate of the State of Tennessee, the House of Representatives concurring. That said proposed amendment to the Constitution of the United States of America, be and the same is hereby ratified by the General Assembly of the State of Tennessee.

"Be it further resolved, That certified copies of the foregoing preamble and joint resolution be forwarded by the Governor of the State of Tennessee to the President of the United States, to the Secretary of State of the United States at Washington, District of Columbia, to the President of the Senate of the United States, and the Speaker of the House of Representatives of the United States."

Mr. Hall called up the motion to reconsider Senate Joint Resolution No. 1.

Mr. Riddick moved his point of order already made.

Mr. Speaker Walker overruled the points of order.

Mr. Odle made the following point of order:

That the proposed supply of copy of Senate Joint Resolution No. 1 does not show that it is a true and perfect copy of said Resolution and is not certified to.

2. That a Resolution cannot be supplied and acted upon but the original must be in the actual possession of the House or no action can be taken.

Mr. Speaker Walker overruled the point of order.

Thereupon, Mr. Hall's motion prevailed.

Mr. Hall moved that the House reconsider its action in concurring in Senate Joint Resolution No. 1.

61 The motion prevailed.

Mr. Hall moved that the House non-concur in Senate Joint Resolution No. 1.

The motion prevailed and the House non-concurred in Senate Joint Resolution No. 1 by the following vote:

Ayes	47
Noes	24
Present and not voting	20

Representatives voting Aye were:—Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Cheek, Cole, Crawford (of Bedford), Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Skidmore, Smith, Story, Swift, Thronesberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Wonnack and Mr. Speaker Walker—47.

Representatives voting No were:—Messrs. Brooks, Burn, Carr, Dodson, Foster, Hanover, Johnson, Keaton, Larsen, Light, Lynn, Morgan, Odle, Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Tucker and Wade—24.

Representatives present and not voting were:—Messrs. Anderson, Bell, Dowlan, Ellis, Fisher, Fitzhugh, Griffin, Harris (of Knox), Hickman, Howard, Jeter, Kahn, Leath, Longhurst, McCalman, Moose, Phelan, Phillips (of Hawkins), Travis (of Henry) and Turner—20.

The following explanation was offered by Mr. Crawford (of Bedford).

Mr. Speaker:

I herewith hand to the Clerk of the House petitions signed by approximately two thousand citizens of my county requesting me to change my vote on the reconsideration of the 19th Amendment and on the ground that the overwhelming majority of my people which I represent are against this Amendment.

I voted for this Amendment originally because it was recommended both by National and State Democratic Conventions and I was voting in accordance with what I deemed the will of my constituents, however, I find that the majority of my constituents in accordance with the above mentioned petitions are opposed to this Amendment.

This is the sole reason for the change of my vote. I desire that this explanation be spread upon the Journal of the House.

J. S. CRAWFORD.

The following explanation was offered by Mr. Howard:

The Amendment has been heretofore voted upon carried by a constitutional majority, certified by the Governor and proclamation certified by Secretary of State and in my opinion is the law of the land and I therefore decline to vote upon the question further.

The following explanation was offered by Mr. W. W. Phillips:

Because I consider that the 19th Amendment has been legally adopted and that any other action on it by this House would be a farce, I desire to be recorded as present and not voting.

Mr. Raddick offered the following protest:

I protest, challenge and deny the right and power of the House of Representatives to reconsider the vote by which the Resolution ratifying the Nineteenth Federal Amendment was adopted.

The Federal Constitution gives to the members of the two Houses of the various State legislatures the power to cast the vote of their States upon the question whether it will ratify any proposed amendment. Like every other voting power, it can be exercised only once in the same election. In passing on last Wednesday the resolution to ratify we were not legislating, we were casting the vote of Tennessee on this question. Tennessee having voted once can vote no more.

63 The power to ratify is not a legislative function, but is a political power, and when once exercised the power is exhausted. In this respect it is exactly like the power of the citizen to vote or the power of the two Houses of the Legislature to elect their officers or certain State officials, like Comptroller, Treasurer, etc. These political powers when once exercised are no longer existent. No one ever heard of a motion to reconsider the election of a Speaker or of a United States Senator. This can no more be done than can the voter reconsider and recall his vote at the polls after it is cast and counted.

I insist that the power to ratify an amendment to a Federal Constitution is precisely like the political power of a citizen to cast his vote or of a legislature to elect officers, and when once exercised is forever ended so far as that election is concerned.

I therefore deny the power of this House to reconsider or change in any respect its action on this resolution at a former day of this session, and respectfully insist that any attempt to do so would be nugatory and void.

I also protest, challenge and deny the power of this House of Representatives to now take any action whatsoever upon Senate Joint Resolution No. 1, upon the ground that it has already refused to reconsider its action concurring in said resolution, and the Clerk of the House, as required by the rules and by special direction of the House, has returned Senate Joint Resolution No. 1 to the Senate. Having thus parted with the possession of said Joint Resolution No. 1, it is now entirely beyond the jurisdiction and control of this House and any action it might attempt to take concerning same would be absolutely nugatory and void.

T. K. RIDDICK.

Mr. Hall moved that the Clerk of the House be and is hereby instructed to notify the Senate that the House had reconsidered its action on Senate Joint Resolution No. 1—Relative to ratifying the 19th Amendment and had non-concurred in the Resolution, which motion prevailed.

64 Thursday, September 2, 1920.

Twenty-fifth Day.

The House met at 10.30 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 86 members were found to be present.

The absent members were: Messrs. Canale, Crawford (of Bedford), Davis, Harris (of Wilson), Luther, Lynn, Martin (of Washington), Miller, Phillips (of Madison), Rowan, Travis (of Franklin), M. E. Whitaker and Wilson, who were excused.

On motion the reading of the Journal was dispensed with.

Message from the Senate.

Mr. Speaker: I am directed to return House message, hereto attached, relative to Senate Joint Resolution No. 1—Relative to the ratifying the 19th Amendment to the Constitution of the United States, upon the following motion:

Mr. Hill moved that the message be returned to the House for the reason that the whole question was out of the hands of the Senate and the Senate has no jurisdiction.

CARTER, *Clerk*.

Mr. Hall moved that the House return the message to the Senate.

The motion prevailed by the following vote:

Ayes	43
Noes	29
Present and not voting	8

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Carr, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Swift, Thronesherry, Vinson, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger, Womack and Mr. Speaker Walker—43.

Representatives voting no were: Messrs. Bell, Burn, Dodson, Down, Fisher, Fitzhugh, Foster, Griffin, Hanover, Howard, Jeter, Kahn, Keaton, Larsen, Light, Longhurst, Lynn, McCalman, Morgan, Moose, Odle, Phelan, Riddick, Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker and Wade—29.

Representatives present and not voting were: Messrs. Anderson, Brooks, Ellis, Harris (of Knox), Johnson, Leath, Rector and Simpson (of Bradley)—8.

Mr. Hall offered the following written motion:

Mr. Speaker—I move that a Committee of three be appointed by the Speaker of the House to secure sworn Transcripts of the Journals of both Houses relative to the non-concurrence by the House in Senate Joint Resolution No. 1, and that the Committee furnish same to the Governor with the request from the House that he certify the action of the House to the Secretary of State of the United States.

The motion prevailed by the following vote:

Ayes	43
Noes	30
Present and not voting.....	1

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Carr, Cassady, Cheek, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronesherry, Vinson, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger, Womack and Mr. Speaker Walker—43.

Representatives voting no were: Messrs. Burn, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of 66 Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Lynn, McCalman, Moose, Morgan, Odle, Phelan, Phillips (of Madison), Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker, Turner, Wade—36.

Representative present but not voting was: Mr. Rucker—1.

Appointments.

Mr. Speaker Walker announced the appointment of Messrs. Bond, Hall and Dunlap as a Committee under Mr. Hall's motion to secure Transcript of the Journal relative to the 19th Amendment.

Saturday, September 4, 1920.

Twenty-seventh Day.

The House met at 10.00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On motion the roll call was dispensed with.

On motion the reading of the Journal was dispensed with.

Mr. Riddick offered the following written motion:

I move that this House determine and declare that the motion to expunge certain resolutions and orders relating to the Nineteenth Federal Amendment, the motion to reconsider Senate Joint Resolution No. 1, and the motion to non-concur therein, all made on Tuesday, August 31, 1920, were never legally adopted, because:

1. The rules of the House require that a motion to expunge must be carried by a two-thirds majority of the members present, or a majority of the entire membership of the House, where no previous notice of said motion has been given; and no such majority was obtained for the motion to expunge, as the Journal shows.

67 2. The motions to reconsider Senate Joint Resolution No. 1 and non-concur therein, could not lawfully be entertained unless and until a motion to expunge or rescind inconsistent motions adopted by the House of Saturday, August 21, 1920, had been legally adopted, which was never done.

Mr. Walker (Mr. Smith presiding) made the point of order that the motion was out of order for the reason that it should have been offered at the time the motion to expunge was adopted by the House.

The Chair (Mr. Smith presiding) ruled the point of order well taken.

Mr. Riddick appealed from the decision of the Chair.

Mr. Speaker Walker assumed the Chair, stating that the question was whether or not the Chair should be sustained.

On a call of the roll the Chair was sustained by the following vote:

Ayes	38
Noes	33
Present and not voting.....	2

Representatives voting aye were: Messrs. Boyd, Bratton, Carter, Cassidy, Crawford (of Bedford), Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronberry, Vinson, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger and Mr. Speaker Walker—38.

Representatives voting no were: Messrs. Bell, Burn, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Howard, Jeter, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, McCalman, Moose, Odle, Phelan, Phillips (of Madison), Riddick, Shoaf, Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker, Turner and Wade—33.

68 Representatives present and not voting were. Messrs. Anderson and Phillips (of Hawkins)—2.

Mr. Riddick offered a paper which he read and asked to be spread on the Journal as an explanation and protest of his vote.

Mr. Hall made the point of order that the paper read by Mr. Rid-

dick was not an explanation but a legal argument and therefore could not be spread upon the Journal.

Mr. Speaker Walker stated that this was a question entirely with the House.

On motion the House refused to spread the paper of Mr. Riddick on the Journal by the following vote:

Ayes	37
Noes	38
Present and not voting.....	2

Representatives voting aye were: Messrs. Anderson, Bell, Burn, Carr, Crawford (of Bedford), Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Howard, Jeter, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, McCalman, Moose, Odle, Phelan, Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker, Turner and Wade—37.

Representatives voting no were: Messrs. Bond, Boyd, Bratton, Carter, Cassady, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Oldham, Overton, Rucker, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronberry, Vinson, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger and Mr. Speaker Walker—38.

Representatives present and not voting were: Messrs. Phillips (of Hawkins) and Russell—2.

Explanations.

My reason for not voting is because I think there is enough on the Journal already and I have said I would vote no more on this subject
PHILLIPS (OF HAWKINS).

69 31. When a question has been made and carried in the affirmative or negative, it shall be in order for any member voting with the prevailing side to move for a reconsideration thereof at any time the same day or the two next succeeding days of actual session; and no motion to reconsider a reconsideration shall be in order. The clerk shall transmit to the Senate no bill, resolution, message, report, amendment or motion, nor shall the Committee on Enrolled Bills present any bill or resolution to the Governor for his action, until the time for moving a reconsideration shall have expired, unless otherwise expressly ordered by the House.

STATE OF TENNESSEE,

County of Davidson:

I, J. D. Green, do hereby certify that I am and was prior to and during the Special Session of the General Assembly of the State of Tennessee, held at the Capitol at Nashville, beginning the 9th day of August, 1920, the Clerk of the House of Representatives of said Gen-

eral Assembly; that it was my duty as such Clerk to keep the Journals showing the official action taken by said House in all matters; that the extracts hereinbefore set forth purporting to be made from the Journals of said House of Representatives, are true and perfect copies of the entries made and appearing upon said Journals; that said entries show all the proceedings had in said House with respect to the proposed adoption of the so-called Suffrage Amendment, or Nineteenth Amendment, to the Constitution of the United States; and I further certify that the foregoing is a true and perfect copy of House Rule No. 31, dealing with consideration, etc., as the same appears among the Rules of said House of Representatives which were in force prior to, and during, said Special Session of the General Assembly of the State of Tennessee, and which are hereto attached.

Witness my hand this 27th day of October, 1920.

J. D. GREEN,
Clerk of Said House of Representatives.

70 Sworn to before me this 27th day of October, 1920 A. D., at
Nashville, Tennessee.

[SEAL.]

E. R. PENNEBAKER, JR.,
Notary Public.

Transcript of Senate Journals, Extraordinary Session, 61st General Assembly, State of Tennessee, on Senate Joint Resolution No. 1, Relative to Ratifying the 19th Amendment to the Constitution of the United States.

Monday, August 9, 1920.

First Day.

In accordance with Governor Roberts' Proclamation issued on August 7, 1920, convening the Legislature in Extraordinary Session for the consideration of questions therein named, Mr. Speaker Todd called the Senate to order at 12 o'clock noon.

The proceedings were opened with prayer by Rev. R. Lin Cave, of Nashville, Tennessee.

On a call of the roll the following members responded to their names: Senators Caldwell, Cameron, Candler, Clarke, Coleman, Collins, Dorris, Fuller, Harber, Haston, Hill, Houk, McFarland, McMahan, Matthews, Parks, Patton, Rice (of Shelby), Rice (of Stewart), Stokard, Summers, Whithy, Wikle and Mr. Speaker Todd—24.

Governor Roberts' Proclamation issued on August 7, 1920, convening the Legislature in Extraordinary Session was read by the Clerk and was as follows:

Proclamation.

To the Members of the Sixty-first General Assembly of the State of Tennessee:

You are hereby called to meet in extraordinary session at the State Capitol in Nashville, Tennessee, at noon, on Monday, August 9, 1920, for the purpose of taking action upon the following subjects deemed of sufficient importance to require immediate attention, to wit:

1. To take action upon the amendment of the Constitution of the United States proposed by the Congress, giving women full right of suffrage, being the proposed Nineteenth Amendment to the Federal Constitution.

* * * * *

Only matters of compelling urgency have been included in this call. It is less than five months until the Legislature will convene in regular session, at which time other matters, both general and special, which have been strongly urged upon me, can be taken up at a time when they may receive full consideration. The pledges made in the Democratic platform not hereinbefore specifically mentioned are in no sense ignored, but will be fully redeemed by the incoming Legislature.

In Testimony Whereof, I have hereunto set my hand and caused the great seal of the State to be affixed at the Capitol at Nashville, on Saturday, August 7, 1920.

A. H. ROBERTS,
Governor.

IKE B. STEVENS,
Secretary of State.

The said Resolution submitted to the various Legislatures in blank, was ordered spread on the Journal and was as follows:

Subject: Concurrent resolution ratifying the proposed amendment to the Constitution of the United States on Woman Suffrage.

Senate concurrent resolution Number — by — —.

House concurrent resolution ratifying the proposed amendment to the Constitution of the United States on Woman Suffrage.

72 Whereas, the Sixty-sixth Congress of the United States of America, in both Houses by a constitutional majority of two-thirds thereof has made the following proposition to amend the Constitution of the United States, in the following words, to wit:

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of each House concurring therein, that the following Article is proposed as an Amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of three-fourths of the several States:

Article —.

The right of citizenship of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this Article by appropriate legislation.

Therefore, be it resolved by the General Assembly of the State of —, that the said proposed amendment to the Constitution of the United States be and the same is hereby ratified by the General Assembly of the State of —.

Resolved, that certified copies of the foregoing preamble and resolution be forwarded by the Governor of the State of — to the President of the United States, the President of the Senate of the United States and the Speaker of the House of Representatives of the United States.

The letter to the Governor accompanying the copy of the foregoing resolution was ordered spread on the Journal and was as follows:

73

Department of State,

Washington,

June 12, 1919.

The Honorable the Governor of the State of Tennessee, Nashville, Tennessee.

SIR:

I have the honor to enclose a certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women," with the request that you cause it to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State as required by Section 205, Revised Statutes of the United States. (See overleaf.)

An acknowledgment of the receipt of this communication is requested.

I have the honor to be, Sir,

Your obedient servant,

FRANK L. POLK,
Acting Secretary of State.

Enclosure Joint resolution as above.

Accompanying said message from the Governor and the Amendment, was an opinion from Attorney-General Frank M. Thompson, which was also ordered spread on the Journal and was as follows:

Chattanooga, Tennessee, June 24, 1920.

Governor A. H. Roberts,
Executive Chamber,
Nashville, Tennessee.

DEAR SIR:

Referring to the conversation had between us and also to the request made by Mrs. Milton asking for an opinion as to
74 whether or not, in view of the constitutional provisions, both Federal and State, and the recent decision of the Supreme Court of the United States, the present Legislature can ratify the 19th Amendment, known as the Suffrage Amendment, the same having been proposed by Congress to the States of the Union since the election of the members of the present General Assembly of Tennessee, I beg to reply as follows:

The Resolution of Congress proposing to the States the 19th Amendment to the Federal Constitution is in the following language:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

'Article I.

The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex; and Congress shall have power to enforce this article by appropriate legislation.' "

The present Legislature of Tennessee was elected in November, 1918, and the terms of office of the members thereof expire in November, 1920. This Legislature was required by the Constitution of Tennessee to meet on the first Monday in January, 1919, in regular session, which it did, and which has, of course, adjourned. It cannot meet again until it expires by law without a special call by the Governor for it to meet in extraordinary session.

This 19th Amendment was proposed under Article V, of the Constitution of the United States.

I have not the exact date of the resolution proposing the amendment, but, of course, it was subsequent to the election of the members of the present Legislature.

The question has arisen as to whether or not the present Legisla-

75 ture of Tennessee can, in extraordinary session, ratify this 19th or Suffrage Amendment, or whether it is precluded from so doing by Article II, Section 32, of the Tennessee Constitution.

The article on the amendment of the Federal Constitution is in this language:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided, that no amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Article II, Section 1, of the Constitution of Tennessee provides that:

"The powers of the Government shall be divided into three departments; the legislative, executive and judicial."

Section 2 of the same article provides:

"That no person or persons belonging to one of the departments shall exercise any of the powers properly belonging to either of the other, except in the cases herein directed or permitted."

Section 3 of the same article is in this language:

"The legislative authority in this State shall be vested in a general assembly, which shall consist of a Senate and House of Representatives, both dependent on the people, who shall hold their offices for two years from the date of the general election."

76 Section 8 of the same article, after providing for the first meeting of the first general assembly under the Constitution of 1870, then contains this language:

"And forever thereafter the general assembly shall meet on the first Monday in January ensuing the election, at which session thereof the Governor shall be inaugurated."

Section 23 of the same article fixes the compensation of each member at \$4.00 per day, and then contains this language:

"And no member shall be paid for more than seventy-five days of a regular session, or for more than twenty days of an extra or

called session, or for and day when absent from his seat in the Legislature, unless physically unable to attend."

The 32nd Section of the same article is as follows:

"No convention or general assembly of this State shall act upon any amendment to the Constitution of the United States proposed by Congress to the several States unless such convention or general assembly shall have been elected after such amendment is submitted."

Article III, Section 1, provides that the supreme executive power of this State shall be vested in the Governor.

Section 9 of Article III provides that:

"He (the Governor) may, on extraordinary occasions, convene the general assembly by proclamation, in which he shall state specifically the purpose for which they are to convene, and they shall enter on no legislative business except that for which they are specifically called together."

It will thus be seen that the Legislature of Tennessee is required by the State Constitution to meet on the first Monday in January every two years; that its regular session begins then, and may extend for as long a period as its members desire, but that said members can receive pay for but seventy-five days' service.

As before shown, the present legislature did meet on the first Monday in January, 1919, in regular session and served
77 seventy-five days, and then adjourned sine die.

Further that the resolution of Congress submitting to it, along with the other States in the Union, this proposed amendment, was passed after the election of the present legislature of Tennessee.

It is further seen from the above constitutional provisions that the Governor of Tennessee may convene the legislature in extraordinary session, but that if he does so, he must state the purposes for which they are to so convene, and that the legislature can enter into no legislation except upon the subjects mentioned in the call or proclamation.

Section 9, of Article III, which provides that the Governor may call the legislature in extraordinary session, but that it can enter into no legislative business except that for which they are specifically called together, has been under review by the Supreme Court of this State, and legislation outside of and beyond the purposes and objects stated in the call or proclamation was held to be void, *State of Tenn. ex rel. vs. Wollen*, 128 Tenn. 456.

It will be further noted that by said Section 32 of Article II, the Tennessee Constitution has attempted to prevent the legislature from ratifying any amendment to the Federal Constitution proposed by the Congress of the United States subsequent to its election.

The questions, then, arise: (1) As to whether the legislature of Tennessee, or any other State, derives its power to ratify or reject this amendment from the Federal Constitution or from the people

of the State as a sovereign, or the State Constitution; and (2) If the legislatures of the several States and of Tennessee derive their power from the people of the State as a sovereign, or from the Constitutions of the respective States, then is said Section 32, of Article II, of the Tennessee Constitution in conflict with Article V of the Federal Constitution?

The Constitution of Ohio, adopted by a vote of the people of that State in November, 1918, contains this provision:

78 "The legislative power of the State shall be vested in a General Assembly, consisting of a Senate and House of Representatives, but the people shall reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote, as hereinafter provided. The people also reserve to themselves the legislative power or the referendum on an action of the General Assembly ratifying any proposed amendment to the Constitution of the United States."

In December, 1917, the Congress of the United States proposed to the several States an amendment thereto prohibiting the manufacture, sale and importation and exportation of intoxicating liquors. The General Assembly of Ohio ratified this proposed amendment. Whereupon, George S. Hawke, a citizen of Ohio, filed a petition in the State Court of that State against Harvey C. Smith, Secretary of State, to enjoin him from preparing the ballots and expending the public money to hold a referendum election, ratifying the action of said legislature. This petition was demurred to; the demurrer was sustained by the lower Court and the petition dismissed. Thereupon, the case was appealed to the Supreme Court of Ohio, where the action of the lower court was sustained; which, of course, meant that the State of Ohio, under its Constitution, had authority to require the submission of the ratification of the proposed amendment by the legislature to a referendum vote of the people. The case then went to the Supreme Court of the United States. This presented, of course, two questions: First, as to whether or not the legislature of Ohio, as well as the legislature of the other States of the Union, derive their authority to ratify a proposed amendment to the Federal Constitution submitted to them by Congress from the Federal Constitution, or from the people of the State as a political entity, or the Constitution of the State; second, if such power is derived from the State or the Constitution of the State, then was the clause of the Constitution of Ohio above quoted in conflict with Article V of the Federal Constitution?

I understand the Supreme Court to have announced the following principles:

79 (1) That the Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States.

(2) That thereby the States surrendered to the general government the powers specifically conferred upon the Nation, and, hence,

the Constitution and the laws of the United States are the supreme law of the land.

(3) That the framers of the Federal Constitution realized that it might, in the progress of time and the development of new conditions, require changes, and that they intended to provide an orderly manner in which these changes could be accomplished; to that end, they adopted the said fifth article.

(4) That said fifth article is therefore a grant of authority by the people of the United States to Congress; that the determination of the method of ratification is the exercise of a national power specifically granted by the people in the Federal Constitution; that this power is conferred upon the Congress, and is limited to two methods, to wit: By action of the legislatures of three-fourths of the States, or by conventions in a like number of States.

(5) That the framers of the Constitution, in requiring ratification by the legislatures and by the use of the word "legislatures," meant the representative body in each State which makes the laws for that State.

(6) But that the act of the legislature of each State of the ratification of a proposed constitutional amendment is not an act of legislation, although performed by the law-making body, but that it is an expression of the assent of the State to the proposed amendment; that it is the exercise not of a legislative function but of a Governmental or political function. That the power of the State to legislate and to enact laws of the State is derived from the people of the State, and is limited or restrained alone by the Constitution of the State, and, of course, the Federal Constitution; but that the power to ratify a proposed amendment to the Federal Constitution is derived from the Federal Constitution, or, more correctly speaking, the people of the United States through the Federal Constitution. In other words, that the act of ratification of a Federal amendment by the State derives its authority from the Federal Constitution, to which the State and its people alike assented. *Hawke vs. Smith*, No. 582, Supreme Court Docket of the United States, decided June 1, 1920.

From the foregoing principles established by the Supreme Court of the United States, if I understand them correctly, I have reached the following conclusions:

(a) That the Legislature of Tennessee derives its power to legislate upon all domestic matters directly from the people of Tennessee, restrained only by the Constitution of Tennessee.

(b) That the act of ratification of the proposed amendment nineteen to the Federal Constitution is not a legislative act or function, but a governmental or political act or function.

(c) That the legislature of Tennessee derives the power to perform this governmental or political function of ratification, or of

refusing to ratify this suffrage or nineteenth amendment, from the fifth article of the Constitution of the United States, and not from the people of Tennessee in its organized form as a State government, or from the Constitution of Tennessee.

(d) That therefore the legislature of Tennessee would not be controlled by said Section 32 of Article II of the Tennessee Constitution, if it should meet in extraordinary session and either ratify or decline to ratify said suffrage or nineteenth amendment.

(e) I think, therefore, that if the legislature of Tennessee should be called in extra session, and should see proper to ratify this suffrage amendment, and to disregard said Section 32 of Article II of the Tennessee Constitution, and the question should be made that its act was invalid because violative of said Article II, Section 32, of the Tennessee Constitution, that the Supreme Court of the United States would hold that the legislature of Tennessee derived its power for its act from the fifth article of the Federal Constitution, 81 and that, if it derived any power at all from the Tennessee Constitution, particularly Article II, Section 32, the same is in conflict with the Federal Constitution, the latter instrument being the supreme law of the land.

I think the foregoing result would follow regardless of whether or not the Governor included the ratification or rejection in his call to be considered by the legislature.

What I mean is this: By Article III, Section 9, of the Tennessee Constitution, the Governor would be required, if he called the legislature in extraordinary session, to place therein the subjects to be legislated upon, and that the legislature would be limited, in matters purely of legislation, to those subjects, but that, in the exercise of this governmental or political function of ratification or refusing to ratify, the legislature would not be controlled by the terms of the Governor's call, or limited to the subjects mentioned in the call.

Section 7, of Article I, of the Federal Constitution provides that:

"Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be passed by two-thirds of the Senate and House of Representatives."

Article II, Section 18, of the Tennessee Constitution provides that:

"Every bill shall be read once on three different days and be passed each time in the House where it originated before transmission to the other. No bill shall become a law until it shall have been read and passed on three different days in each House, and shall have received on its final passage in each House the assent of a majority of all the members to which that House shall be entitled under this Constitution; and shall have been signed by the respective speakers in open session; the fact of such signing to be

82 noted on the Journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution."

Article III, Section 18, of the Tennessee Constitution is as follows:

"Every bill which may pass both Houses of the General Assembly shall, before it becomes a law, be presented to the Governor for his signature. If he approve it, he shall sign it, and the same shall become a law, but if he refuse to sign it, he shall return it with his objection thereto in writing to the House in which it originated; and said House shall cause said objection to be entered at large upon its Journal and proceed to reconsider the bill. If after such reconsideration a majority of all the members elected to that House shall agree to pass the bill notwithstanding the objection of the Executive, it shall be sent with said objection to the other House, by which it shall likewise be reconsidered. If approved by a majority of the whole members elected to the House, it shall become a law. The votes of both Houses shall be determined by yeas and nays, and the names of all the members voting for or against the bill shall be entered upon the Journals of their respective Houses. If the Governor shall fail to return any bill within five days (Sunday excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly by its adjournment prevents its return, in which case it shall not become a law. Every joint resolution or order (except on questions of adjournment) shall likewise be presented to the Governor for his signature, and, before it shall take effect, shall receive his signature, and on being disapproved by him, shall in like manner be returned with his objection; and the same, before it shall take effect, shall be repassed by a majority of all the members elected to both Houses in the manner and according to the rules prescribed in the case of a bill."

The Congress of the United States, in 1797, proposed the Eleventh Amendment to the Federal Constitution by a Joint Resolution identical in language to the one proposing the said suffrage amendment.

83 By it, it was provided that the judicial powers of the United States should not be construed to extend to any suit in equity prosecuted against any one of the States by any citizen of that State or any foreign State. This resolution proposing this Eleventh Amendment was never submitted to the President for his signature or rejection. This fact was made one of the grounds for the contention that the amendment was invalid. The Attorney-General answered that the amendment was a substantive act, disconnected with the ordinary business of legislation, and not within either the policy or terms of the Constitution vesting the President with a qualified negative of acts or resolutions *on* Congress. In other words, the Attorney-General made the point that the signature of assent or disapproval of the President was only required to those acts and resolutions which were legislative acts or resolutions, and not to acts and resolutions of Congress which were political and non-

legislative. Further, that the President of the United States had nothing to do whatever with the political function of an amendment to the Federal Constitution.

This view of the Attorney-General was sustained by the Supreme Court of the United States in an unanimous opinion at its February term, 1798. *Hollinsworth vs. Virginia*, 3 Dallas, 378.

This *Hollinsworth* case was quoted approvingly by the present Supreme Court of the United States in its opinion in the case of *Hawke vs. Smith*, supra, rendered on the first day of June of the present year.

It was quoted approvingly and followed by the Supreme Court of this State in 1909, in the case of *Richardson vs. Young*, 122 Tennessee, 474, et seq.

In this last case, the section of the State election law under consideration provided that the members of the State Board of Election should be elected prior to the first Monday in April, 1909, by the legislature, on a date to be fixed by joint resolution of the General Assembly, and that thereafter, at each biennial session, one member of such board should be elected prior to the first Monday in April, on a date to be fixed by joint resolution of said legislature. The

legislature fixed a date by joint resolution for the election of
84 this board, which resolution was vetoed by the Governor.

Before the date of election fixed by the joint resolution arrived, a quorum of the Senate was broken by the members thereof leaving the State. However, a majority of both Houses met on the said date fixed in said joint resolution and proceeded to elect said officers. Litigation ensued. The Supreme Court of this State, after first quoting the various clauses of the Tennessee Constitution providing that the powers of the State government should be divided into legislative, executive and judicial, and after defining the same, held that the power to elect or to appoint to public office was a political power which was not inherently either legislative, judicial or executive, but that said power should be exercised by either of the three branches of the government, that it, by the legislative, executive, or judicial, as the legislature might see proper, in creating the office, to determine.

It therefore held that the selection of these members of the Election Board by the legislature was a political function, and not a legislative function, and that the joint resolution was not such a resolution as required, under said Article II, Section 18, and Article III, Section 18, of the Tennessee Constitution, either the approval or disapproval of the Governor. It held, therefore, that said joint resolution did not require either the approval or disapproval of the Governor, and that, hence, his veto of the same was ineffectual for any purpose. In doing this it cited and quoted approvingly from the case of *Hillingsworth vs. Virginia*, supra. In other words, the Supreme Court of Tennessee and the Supreme Court of the United States appear to be in perfect accord upon the proposition that where legislative bodies, whether it be the Congress of the United States or the legislature of Tennessee, are performing a political function, they are not legislative bodies within the sense and meaning of the Fed-

eral or State Constitutions, and that the executive—that is the President or the Governor, as the case may be—cannot control the action of either by veto, as he can when the matter under consideration is purely legislative.

These conclusions lead me to believe that, if the Governor calls the legislature in extraordinary session at any time before the
85 next November election, it can, if it sees proper, ratify this Nineteenth Amendment. It can do this, in my judgment, regardless of whether he mentions the ratification or rejection in the proclamation or call for the extra session.

In view of the well known opposition of a class of citizenship, without regard to political affiliations, against woman's suffrage; the fact that, if Tennessee should ratify this Amendment, it would affect every State in the Union and give to the women of each State, who are otherwise qualified to vote under the State law, the right of suffrage; the widely divergent views of the two dominant parties in the Government upon both economic and foreign policies and the fact that it is not known to which side this large vote would lean, I felt that litigation would necessarily ensue, either to prevent the consummation of the ratification by the legislature, or else to have its acts ratifying the proposed amendment declared void and women denied the right of suffrage; hence, I felt it incumbent upon me to submit an exact duplicate of the foregoing letter to the Department of Justice, through General Frierson, who is a Tennesseean, and, also, to Judge Cordell Hull, representative in Congress from the Fourth District, in order that they might discuss the matter with Federal officials, and get the opinion and views of the Department of Justice and of as many Senators and Representatives upon this legal question as could be had.

I have not yet heard from Judge Hull, who is at San Francisco. However, I am in receipt of a letter from General Frierson, which is as follows:

"I am in receipt of your letter enclosing copy of one written by you to Judge Hull, discussing the matter of calling an extra session of the legislature to ratify the suffrage amendment. I agree entirely with your conclusion that if the Governor calls an extra session and names the suffrage amendment in his call the legislature may lawfully ratify. I am not so sure that this would be true of the Governor should omit from his call any mention of the suffrage amend-

ment. There is no doubt in my mind that the power of the
86 legislature to ratify is derived from the people of the United States through the Federal Constitution and not from the people or the Constitution of the State. It may be said, however, that the framers of the Constitution had in contemplation a representative body not continuously in session but meeting at certain definite times fixed by law. The action of a legislature so assembled, cannot, I think, be fettered by any restrictions sought to be imposed by the State Constitution. I am not sure, however, that it can be said that the right of a State to provide that, when an emergency requires the assembling of the legislature in extra session, it shall be confined to subjects of legislation mentioned in the call,

may not be exercised without coming in conflict with the provisions of the Constitution of the United States relating to amendments. At any rate, if an extra session is called, I think this subject ought to be specifically mentioned, for if it should be omitted and the legislature should act, the result would be simply to give another ground for uncertainty.

I have considered your suggestions as to the danger that may result from action of this kind at this time and have discussed them with the Attorney-General. It is possible, of course, that embarrassing litigation may result, but we are inclined to the view that these dangers are not sufficiently threatening to deter the Governor from calling an extra session if he thinks it otherwise advisable."

This correspondence between Judge Hull, Mr. Frierson and myself, is the basis of the correspondence between General Frierson and the President, as carried in today's papers.

In view of the doubt expressed by General Frierson, and his suggestion that this ratification be specifically mentioned in the call, I think, if you see proper to call an extraordinary session, that you should include it in your proclamation. While I do not think it is necessary, I think it would be a proper precaution to take.

From the foregoing you will at once see that it is my view that, if you do call the legislature into extra session, it can ratify this proposed amendment.

Of course, the question of policy as to calling it at all, or as to the time it should be called, and the purposes for which it should be called, are matters for you to determine, and about which I should not express an opinion.

Yours truly,

(Signed)

FRANK M. THOMPSON,

Attorney-General.

Tuesday, August 10, 1920.

Second Day.

The Senate met at 10:00 o'clock A. M., pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by Senator Cameron.

On a call of the roll all of the Senators responded to their names except Messrs. Candler, Coleman and Rice (of Shelby).

On motion the reading of the Journal was dispensed with.

Mr. M. H. Copenhaver presented his certificate and was administered the official oath by Mr. Speaker Todd.

Mr. Copenhaver was appointed in the place of Senator Worley on all Committees.

Introduction of Resolutions.

By Mr. Speaker Todd—Senate Joint Resolution No. 1—relative to ratifying the 19th Amendment to the Constitution of the United States.

Under the rules the Resolution lies over.

Wednesday, August 11, 1920.

Third Day.

The Senate met at 11:00 o'clock A. M., pursuant to adjournment and was called to order by Mr. Speaker Todd.

88 The proceedings were opened with prayer by the Chaplain, Rev. R. Lin Cave.

On motion the calling of the roll was dispensed with.

On motion the reading of the Journal was dispensed with.

Mr. J. W. Murrey, Senator elect, presented his certificate and was sworn in as Senator by Mr. Speaker Todd.

Mr. Murray was appointed by Mr. Speaker Todd to serve in the place of Senator Louthan on all Committees.

Resolutions Lying Over.

Senate Joint Resolution No. 1—Relative to ratifying 19th Amendment.

Mr. Candler moved that the Resolution be referred to the Committee on Judiciary.

Mr. Fuller raised the point of order that the question as to which Committee the Resolution should be referred should be left entirely to *h*is judgment of the Speaker.

The Chair held that the point of order was not well taken and that the motion to refer was in order.

Mr. Fuller moved that the motion to refer the Resolution to the Judiciary Committee be laid on the table and on the call of the roll the motion prevailed by the following vote:

Ayes	14
Noes	12

Senators voting Aye were:—Messrs. Bradley, Burkhalter, Collins, Copenhagen, Dorris, Fuller, Gwin, Harber, Haston, Houk, McMahon, Matthews, Stockard and Wikle—14.

Senators voting No were: Messrs. Cameron, Candler, Coleman, Long, McFarland, Miller, Monroe, Murrey, Parks, Rice (of Stewart), Summers and Whitby—12.

The Resolution was referred to the Committee on Constitutional Amendments.

89

Friday, August 13, 1920.

Fifth Day.

The Senate met at 10:30 A. M. o'clock, pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. R. Lin Cave.

On a call of the roll all Senators responded to their names except Messrs. Caldwell, Clarke, Gwin, McFarland and Monroe.

On motion the reading of the Journal was dispensed with.

Reports from Standing Committees.

Constitutional Amendments.

Mr. Gwin presented the majority report, signed by Messrs. Gwin, Copenhaver, Houk, Collins, Murrey, Coleman, Wikle and Hatson, on Senate Joint Resolution No. 1, as follows:

To the Speaker and Members of the Senate:

The Committee on Constitutional Amendments has carefully considered Senate Joint Resolution No. 1 and is of the opinion that the present Legislature has both a legal and moral right to ratify the proposed resolution.

Full power and jurisdiction of the question is conferred upon State Legislatures by the F-fth Article of the Federal Constitution. This power is not conferred upon some and withheld from others, but is granted to all, and any Legislature may lawfully exercise the power thus expressly conferred. Therefore, the provision of the Constitution of Tennessee which undertakes to deny to the present Legislature the right to exercise such power is clearly null and void because in direct conflict with the United States Constitution. To attempt to deny to this Legislature, or any Legislature, this power is not only without legal force and effect, but is clearly not binding as a moral obligation. To contend that an illegal provision of a

90 State Constitution imposes a duty or creates a moral obligation, is to state a proposition that is manifestly and fundamentally wrong. The United States Constitution is the supreme law of the land, and it is, therefore, no violation of his official oath for any legislator to disregard a State Constitutional inhibition that is in direct and irreconcilable conflict with the plain provision of the Federal Constitution. On the contrary, to be governed by a nugatory clause of the State Constitution on a purely Federal question—and that is what the 19th Amendment is—would be dangerously near a violation of the oath to support the Constitution of the United States. Legal opinions and common sense arguments could be multiplied in support of this position, but these are deemed unnecessary.

In view of the fact that all the members of this Senate are either democrats or republicans and that both nominees and platforms of their respective parties, State and National, have unequivocally declared for the ratification of this Amendment and that its final adoption is as certain as the recurrence of the seasons, and the further fact that this Senate has heretofore taken a stand in favor of woman's suffrage by the enfranchisement as far as was legally possible of the womanhood of Tennessee, we have not considered it necessary to state the many good reasons that might be urged in favor of the adoption of the Amendment.

National woman's suffrage by Federal Amendment is at hand; it may be delayed but it cannot be defeated; and we covet for Ten-

nessee the signal honor of being the 36th and last State necessary to consummate this great reform.

Fully persuaded of its justice and confident of its passage, we earnestly recommend the adoption of the Resolution.

Respectfully submitted,

L. E. GWIN,

Chairman.

M. H. COPENHAVER.

JNO. C. HOUK.

C. C. COLLINS.

J. W. MURREY.

T. L. COLEMAN.

DOUGLAS WIKLE.

E. N. HASTON.

91 Mr. Cameron presented the minority report, signed by Messrs. Cameron and Rice (of Stewart), as follows:

To the Speaker and Members of the Senate:

The undersigned members of the Committee, make to your Honorable Body the following minority report and recommendation:

That this Body refuse to act upon Senate Joint Resolution No. 1, we being of opinion that the present Legislature has no right or authority to act thereon at all, and that the same should be deferred to the succeeding Legislature.

We therefore dissent from the recommendation of the majority and recommend in lieu that no action upon the subject be taken at this special session.

Respectfully submitted,

J. W. RICE

W. M. CAMERON.

Mr. Cameron made a motion to adopt the minority report.

Mr. Haston made a motion to table the motion to adopt the minority report.

On a call of the roll the result on the motion to table was as follows:

Ayes	23
Noes	10

Senators voting Aye were:—Messrs. Bradley, Burkhalter, Caldwell, Carter, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Haston, Hill, Houk, McMahan, Matthews, Monroe, Murrey, Patton, Rice (of Shelby), Stockard, Wikle and Mr. Speaker Todd—23.

Senators voting No were:—Messrs. Cameron, Candler, Clarke, Long, McFarland, Miller, Parks, Rice (of Stewart), Summers and Whitby—10.

Mr. Haston made a motion to adopt the majority report. The motion prevailed.

Resolutions Lying Over.

Senate Joint Resolution No. 1—Relative to ratifying proposed 19th Amendment to the United States Constitution.

Mr. Haston made a motion to adopt the Resolution.

Mr. McFarland made the point of order in writing as follows:

Mr. Speaker,

I make the point of order that the Senate has no right or authority to act upon the proposed Amendment to the Federal Constitution under the Constitution of the State of Tennessee, Article 2, Section 32.

McFARLAND.

The Speaker's ruling on the above point of order is as follows:

On the point of order made by the Senator from Wilson, the Speaker rules that it is not in the province of the Speaker to determine or pass upon the authority or power of the Senate to act under the Constitution to consider this proposed Amendment, but that this is a question for the Body to determine.

Point of order overruled.

Mr. McFarland appealed from the ruling of the chair.

Mr. Speaker Todd called Mr. Hill to the chair, who put the question to the Senate as follows:—Shall the ruling of the chair be sustained?

Mr. Gwin made the following point of order:—That discussion must be confined to the appeal from the ruling of the Chair and that it was not in order to discuss the constitutionality of the Resolution.

The Chair ruled that the point of order was well taken.

On a call of the Chair was sustained by the following vote:

Ayes	27
Noes	5

93 Senators voting Aye were:—Messrs. Bradley, Burkhalter, Caldwell, Cameron, Carter, Clarke, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Hatson, Hill, Houk, Long, McMahan, Matthews, Miller, Monroe, Murrey, Parks, Patton, Rice (of Shelby), Stockard and Wikle—27.

Senators voting No were:—Messrs. Candler, McFarland, Rice (of Stewart), Summers and Whitby—5.

Mr. Haston renewed his motion on the adoption of the Resolution.

The motion prevailed.

On a call of the roll the Resolution was adopted by the following vote:

Ayes	25
Noes	4
Present not voting	2

Senators voting Aye were:—Messrs. Bradley, Burkhalter, Caldwell, Carter, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Haston, Hill, Houk, Long, McMahan, Matthews, Monroe, Murrey, Patton, Rice (of Shelby), Stockard, Whitby, Wikle and Mr. Speaker Todd—25.

Senators voting No were:—Messrs. Candler, Parks, Rice (of Stewart) and Summers—4.

Senators present not voting were:—Messrs. McFarland and Miller—2.

A motion to reconsider was laid on the table.

Explanations.

Mr. Speaker:

I refuse to vote on the proposed Federal Amendment from the fact that I am not inclined to perjury myself by violating, what I consider, my solemn oath.

(Signed)

LON P. McFARLAND.

Explanation of Mr. Dorris follows:

94 Explanation of Mr. Dorris of his vote on Senate Joint Resolution No. 1 on the ratification of the Woman's Suffrage Amendment to the Federal Constitution.

Several months ago when it became apparent that the Legislature would be called together in extra session to act upon some vital matters, it also became apparent that the 19th Amendment to the Federal Constitution, giving women the right of suffrage, would be included.

Being in favor of Woman's Suffrage, I set about the task of working out for myself the question as to whether I would be violating my oath to the State if I voted for the Amendment at this time. In trying to arrive at a conclusion, I finally worked out the solution in my own mind, basing my opinion on this construction:

"The Constitution of the United States when adopted and ratified by the States was complete within itself, and no other instrument of any kind not adopted by the same power or ratified by the States could in any way modify or control it."

The United States Supreme Court in deciding the recent case of *Hawke vs. Smith*, among other things, said:

"It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

It is held by many that the present Legislature could not legally ratify the Amendment without violating their oath to the Constitu-

tion of Tennessee. The Constitution of Tennessee, Section 32, Article II, specifically states:

"No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or general assembly shall have been elected after such amendment is submitted."

95 When we follow the Constitution of Tennessee there is only one construction that can be placed upon this point, and that is that it was clearly in the minds of the framers of the Constitution of 1870 that all amendments to the Federal Constitution hereafter submitted should be ratified by the vote of the people, either by election to the general assembly, or by a convention which is equivalent to a referendum by the people. This the Supreme Court of the United States clearly sets out in the *Hawke vs. Smith* decision could not be done. On this point the Court said:

"The Constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, Section 1, provides:

"The legislative power of the State shall be vested in a General Assembly consisting of a Senate and House of Representatives, but the people shall reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

"The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."

Therefore, when Section 32, Article II, was written into the Constitution of Tennessee, the framers wrote a clause that was null, void and non-existent.

96 And with this view of the question I have been able to reach the conclusion that I would not be violating my oath to the State when I cast my vote to ratify the Amendment, and I, therefore, vote "aye."

FINLEY M. DORRIS.

Monday, August 16, 1920.

Eighth Day.

The Senate met at 2:00 o'clock P. M., pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. R. Lin Cave.

On a call of the roll all the Senators responding to their names except Messrs. Bradley, Fuller and Long.

Mr. McFarland reported that Mr. Bradley was absent on account of illness.

On motion the reading of the Journal was dispensed with.

Enrolled Bills.

Mr. Speaker:

Your Committee on Enrolled Bills beg to leave to report that we have carefully examined Senate Joint Resolution No. 1, and find same correctly engrossed and ready for transmission to the House.

SUMMERS,

Chairman.

Tuesday, August 24, 1920.

Sixteenth Day.

The Senate met at 10:30 o'clock A. M., pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Rev. A. I. Foster.

On a call of the roll all of the Senators responded to their names except:—Messrs. Coleman, Fuller, Harber, Long, Murrey and Rice (of Shelby).

97 On motion the reading of the Journal was dispensed with.

Mr. McFarland moved that the Speaker of the Senate be authorized to appoint a Committee of three with instructed duty to wait on the Governor and report back to the Senate the status of the Suffrage Amendment.

The motion prevailed.

Appointment Announced.

The Speaker announced the appointment of Messrs. McFarland, Copenhaver and Cameron as members of the Committee to wait on the Governor.

Committee Report.

The Committee, appointed by the Speaker to wait on the Governor, and to report back to the Senate the status of the Suffrage Amendment, made the following report in writing:

Mr. Speaker:

We, your Committee, beg to report that after an interview with the Governor that he stated to us, that on advice of the Attorney-General of the State that he had certified to the authorities at Washington, the action of both House and Senate on the 19th Amendment and that he had embodied in his report a copy of both House and Senate Journals as it actually occurred in the Journal.

McFARLAND,
CAMERON,
COPENHAVER.

Committee Report.

Mr. Gwin, Chairman of the Committee appointed to investigate the legal status of the injunction heretofore issued restraining the Clerk from certain duties, made the following verbal report:

The Committee, composed of Senators Gwin, Haston and Collins, report that they have been informed that the injunction heretofore issued restraining the Clerk from communicating to the Senate a report from the Clerk of the House and certain resolutions adopted by the House in regard to Senate Joint Resolution No. 1, had been suspended by writ from the Chief Justice of the Supreme Court and that there was no danger of any legal objection to the Senate receiving and acting on such report.

House Message.

The following message was received from the House through its Clerk:

Mr. Speaker:

I am directed to return to the Senate—Senate Joint Resolution No. 1—relative to ratifying the 19th Federal Amendment:

By the following written motion:

Mr. Speaker:

I move you that the Clerk of this House be, and he is hereby instructed to transmit to the Senate through the ordinary procedure Senate Joint Resolution No. 1.

Attached herewith and made a part of this message is a transcript of the Journal of the House of Representatives of the 61st General Assembly in Extraordinary Session assembled with reference to the action of the House on Senate Joint Resolution No. 1.

GREEN,
Clerk of the House of Representatives.

The attached copy of the House Journal was as follows:

Monday, August 16, 1920.

Eighth Day.

The House met at 2:00 P. M., and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

99 On a call of the roll 98 members were found to be present.

The absent member was Mr. Harris (of Wilson).

On motion the reading of the Journal was dispensed with.

Message from the Senate.

Mr. Speaker:

I am directed to transmit to the House, Senate Joint Resolution No. 1—Relative to the Nineteenth Amendment to the Constitution, adopted for concurrence.

CARTER,
Clerk.

Tuesday, August 17, 1920.

Ninth Day.

The House met at 10.30 a. m., and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 96 members were found to be present. The absent members were:—Messrs. Brooks and Rowan, who were excused, and Harris (of Wilson).

On motion the reading of the Journal was dispensed with.

Resolutions Lying Over.

Senate Joint Resolution No. 1—Relative to ratifying the 19th Amendment.

Pending consideration of the Resolution (Mr. Overton presiding). Mr. Walker's motion to adjourn until tomorrow at 10.00 a. m., prevailed by the following vote:

Ayes	52
Noes	44

Representatives voting Aye were:—Messrs. Bond, Boyd, Boyer, Bratton, Burn, Carter, Carr, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Hickman, Jackson, Keisling, Leath, Long, Martin (of Hamilton), McCalman, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Phelan, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Travis (of Franklin),

Turner, Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—52.

Representatives voting No were:—Messrs. Anderson, Bell, Brooks, Canale, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Forsythe, Griffin, Hanover, Harris (of Knox), Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Light, Longhurst, Luther, Lynn, Martin (of Washington), Miller, Morgan, Moose, Odle, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Thornesberry, Travis (of Henry), Tucker and Wade—44.

Wednesday, August 18, 1920.

Tenth Day.

The House met at 10.00 a. m., and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 96 members were found to be present.

The absent members were:—Messrs. Brooks, Harris (of Wilson) and Rowan, who were excused.

On motion the reading of the Journal was dispensed with.

Unfinished Business.

Senate Joint Resolution No. 1—Relative to ratification of 19th Amendment.

Mr. Walker (Mr. Overton presiding) moved that the Resolution be tabled.

101 The motion failed for want of major-ty by the following vote:

Ayes	48
Noes	48

Representatives voting Aye were:—Messrs. Bond, Boyd, Boyer, Bratton, Burn, Carter, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Novell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thornesberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—48.

Representatives voting No were:—Messrs. Anderson, Bell, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of

Madison), Rector, Riddick Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner and Wade—48.

Thereupon the Resolution was concurred in — the following vote:

Ayes	50
Noes	46

Representatives voting Aye were:—Messrs. Anderson, Bell, Burn, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Loughurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner, Wade and Mr. Speaker Walker—50.

102 Representatives voting No were:—Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hayes, Jackson, Keisling, Long, Martin (of Hamilton), McMurrey, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronesberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger and Womack—46.

Explanations.

Messrs. Cassady and Hall offered explanations which were spread at large upon the Journal.

Mr. Walker (Mr. Overton presiding) changed his vote from "No" to "Aye," and entered a motion on the Journal to reconsider.

Saturday, August 21, 1920.

Thirteenth Day.

The House met at 10.00 a. m., and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

Mr. Riddick moved that the call of the roll be dispensed with. The motion prevailed.

On motion the reading of the Journal was dispensed with.

Mr. Montgomery made the point of order that no quorum was present and demanded a roll call.

On a call of the roll the following members were found to be present:—Messrs. Anderson, Bell, Bond, Boyer, Brooks, Burn, Canale, Carr, Cassady, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis,

Fisher, Fitzhugh, Forsythe, Foster, Frogge, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of 103 Washington), Martin (of Hamilton), McCalman, Miller, Montgomery, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Thonesberry, Travis (of Henry,) Tucker, Turner, Wade and Mr. Speaker Walker—59.

Mr. Odle moved that the Speaker prepare a list of the absentees and give same to the Sergeant-at-Arms with the request that he go out and arrest any and all absent members and bring them into the House.

Before the motion was put Mr. Speaker Walker announced that under the rules of the House such action on his part was necessary and instructed the Sergeant-at-Arms to secure a list of the absent members and, if possible, bring the members to the House.

On motion of Mr. Riddick at 10.30 A. M., the House recessed for one hour.

At the expiration of the recess the House was called to order by Mr. Speaker Walker.

Mr. Riddick offered the following written motion:

Mr. Speaker: I call from the Journal the motion to reconsider Senate Joint Resolution No. 1.

Mr. Speaker Walker ruled the motion out of order for the following reasons:

1st. Because the roll call shows no quorum present.

Section II of Article II of the Constitution of the State provides in part: "Not less than two-thirds of all the members to which each House shall be entitled shall constitute a quorum to do business; but a small number may adjourn from day to day, and may be authorized by law to compel the attendance of absent members.

2nd. Because the Attorney-General of the State has held that it was only necessary for a majority of the members present constituting a quorum to ratify the 19th Amendment. If it requires 104 a quorum to pass on the question of ratification, certain it is that a quorum must be present to reconsider.

3rd. STATE OF TENNESSEE:

To A. H. Roberts, Governor of the State of Tennessee; Ike B. Stevens, Secretary of State of the State of Tennessee; A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee; Seth Walker, Speaker of the House of Representatives of the State of Tennessee, and their counselors, attorneys, solicitors and agents, and each and every one of them. Greeting:

Whereas, in a certain suit instituted in Part 2 of our Court of Chancery at Nashville, by C. Runcie Clements, Rufus E. Fort,

Edward Buford, Dudley Gale, James A. Yowell, A. S. Warren and George Washington, complainants, against A. H. Roberts, Ike B. Stevens, A. L. Todd and Seth Walker, defendants, the complainants having obtained from Honorable E. G. Langford, a fiat for a writ of injunction to issue to enjoin defendants A. H. Roberts, Governor of the State of Tennessee, Ike B. Stevens, Secretary of State, A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee, and Seth Walker, Speaker of the House of Representatives of the General Assembly of the State of Tennessee, and each of them, from making, signing or issuing any proclamation, declaration, resolution or certificate, declaring that the State of Tennessee has constitutionally and legally adopted the proposed Nineteenth Amendment to the Constitution of the United States, and from taking any official action, with reference to the illegal action, with reference to the illegal action of the special session of the General Assembly of the State of Tennessee purporting to ratify and adopt said Nineteenth Amendment to the Constitution of the United States; and

The complainants having executed the bond required by the said fiat; we, therefore, in consideration of the premises aforesaid do strictly enjoin and command you, the said A. H. Roberts, Ike B. Stevens, A. L. Todd and Seth Walker, in their official capacities—set forth above, and all and every person before mentioned, under the penalty prescribed by law, of your and every of your
105 goods, lands, tenements, to be levied to our use, and that you and every of you do absolutely desist from doing any of the things above forbidden, restrained and enjoined—until hearing of this cause in our said Courts of Chancery.

Witness, Joseph R. West, Clerk and Master of our said Court, at office, the first Monday in April, in the year of our Lord, 1920, and in the 144th year of our Independence.

(Signed)

JOSEPH R. WEST,

Clerk and Master,

By C. H. SWANN,

Deputy Clerk and Master.

Mr. Riddick appealed from the decision of the Chair.

The Chair (Mr. Odle presiding) stated that the question was whether or not the Chair should be sustained in its ruling.

On a call of the roll the House refused to sustain the decision of the Chair by the following vote:

Ayes	8
Noes	19
Present, and not voting.....	1

Representatives voting Aye were:—Messrs. Bond, Boyer, Cassidy, Forsythe, Frogge, Martin (of Hamilton), Montgomery and Thronberry—8.

Representatives voting No were: Messrs. Anderson, Bell, Brooks, Burn, Canale, Carr, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox)

Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker and Wade—49.

The Representative present and not voting was: Mr. Speaker Walker—1.

106 Mr. Riddick offered the following written motion:

Mr. Speaker: I move you that the House now reconsider its action in concurring in the adoption of Senate Joint Resolution No. 1.

Mr. Walker (Mr. Odle presiding) made the point of order that no quorum was present and demanded a roll call.

The Chair (Mr. Odle presiding) stated that he would first have a roll call on Mr. Riddick's motion and after that was disposed of would order a roll call on the demand of Mr. Walker that a quorum was not present.

Mr. Walker again demanded a roll call on the point of order that no quorum was present.

The Chair (Mr. Odle presiding) stated that there was a motion before the House and that a roll call on Mr. Walker's demand that no quorum was present would be ordered immediately after the motion of Mr. Riddick was disposed of.

Thereupon the motion of Mr. Riddick that the House reconsider its action in concurring in and adopting Senate Joint Resolution No. 1 failed by the following vote:

Ayes	0
Noes	49
Present and not voting.....	9

Representatives voting no were: Messrs. Anderson, Bell, Brooks, Burn, Canale, Crawford (of Bedford), Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin (of Washington), McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips (of Hawkins), Phillips (of Madison), Rector, Riddicks, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stovall, Swink, Tarrant, Travis (of Henry), Tucker, Turner and Wade—49.

107 Representatives present and not voting were: Messrs. Bond, Boyer, Cassady, Forsythe, Frogge, Martin (of Hamilton), Montgomery, Thronesberry and Mr. Speaker Walker—9.

Mr. Walker (Mr. Odle presiding) made the point of order that Mr. Odle was only acting as Speaker by his request and was therefore enjoined from putting any motion before the House.

Mr. Riddick offered the following written motion:

Mr. Speaker: I move you that the Clerk of this House, be, and he hereby instructed to transmit to the Senate through the ordinary procedure Senate Joint Resolution No. 1.

On a vive voce vote the Chair (Mr. Odle presiding) declared the motion carried.

On motion of Mr. Riddick the House adjourned until 3:00 P. M. Monday.

Messrs. Gwin, Haston and Collins made the following motion in writing:

Be it ordered by the Senate that the original copy of Senate Joint Resolution No. 1, now in the hands of the Clerk of the Senate, having been returned to him by the Clerk of the House, together with the report of such Clerk, be spread on the Journal by the Clerk of the Senate, and retain in his possession as a part of the records of the Senate, until the final adjournment of the present session of the 61st General Assembly, and then file with the Secretary of State as a part of the records of his office.

Mr. Monroe made the point of order that the motion was out of order, as the Senate had rules of its own to govern its procedure.

The point of order was overruled by the Speaker.

Mr. Gwin moved that the Rules be suspended for the immediate consideration of the motion in writing.

Mr. Candler moved that the motion to suspend the Rules be laid on the table, and on call of the roll the motion to table failed by the following vote:

108	Ayes	7
	Noes	17

Senators voting Aye were Messrs. Cameron, Candler, Clarke, McFarland, Parks, Rice (of Stewart), and Summers—7.

Senators voting No were Messrs. Bradley, Burkhalter, Caldwell, Carter, Collins, Copenhaver, Dorris, Gwin, Haston, Hill, Houk, Matthews, Miller, Patton, Whitby, Wikle and Mr. Speaker Todd—17.

On motion of Mr. Gwin the motion in writing prevailed.

Senate Joint Resolution No. 1 having been ordered spread on the Journal in compliance with the motion in writing, is as follows:

"A Joint Resolution ratifying a proposed Amendment to the Constitution of the United States, providing that the right of citizens of the United States to vote, shall not be denied or abridged by the United States or by any State on account of sex, and providing further that Congress shall have power to enforce this Article by appropriate legislation.

"Whereas, both Houses of the Sixty-Sixth Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, passed a resolution submitting to the several States a proposition to amend the Constitution of the United States, a certified copy of which has been received by the Governor of the State of Tennessee, from the Secretary of State of the United States, as required by law, and by him transmitted to the General Assembly, the same being in the following words, to wit:

"Sixty-Sixth Congress of the United States of America, At the first Session.

Begun and held at the City of Washington on Monday, the nineteenth day of May, one thousand nine hundred and nineteen.

109

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States.

Article —.

'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

'Congress shall have power to enforce this Article by appropriate legislation.'

F. H. GILLETTE,

Speaker of the House of Representatives.

THOS. R. MARSHALL,

Vice President of the United States

and President of Senate.

"Be it resolved by the Senate of the State of Tennessee, the House of Representatives concurring, that said proposed Amendment to the Constitution of the United States of America, be, and the same is, hereby ratified by the General Assembly of the State of Tennessee.

"Be it further resolved, that certified copies of the foregoing preamble and Joint Resolution be forwarded by the Governor of the State of Tennessee to the President of the United States, to the Secretary of State of the United States at Washington, District of Columbia, to the President of the Senate of the United States and the Speaker of the House of Representatives of the United States."

110

Wednesday, September 1, 1920.

Twenty-fourth Day.

The Senate met at 10:30 o'clock A. M. pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. A. I. Foster.

On a call of the roll all the Senators responded to their names except Messrs. Carter, Copenhagen, Gwin and Patton.

On motion the reading of the Journal was dispensed with.

The Clerk of the Senate announced a message just received from the Clerk of the House, relative to Senate Joint Resolution No. 1.

Mr. Haston moved that the Senate pass action for the present on the Resolution just received from the House.

Mr. McFarland moved to amend the motion by making the hour of 3 o'clock as the time for consideration of said Resolution.

The motion prevailed and the motion as amended prevailed.

Afternoon Session.

Wednesday, September 1, 1920.

The Senate met at 2 o'clock P. M. pursuant to adjournment and was called to order by Mr. Speaker Todd.

On motion the calling of the roll was dispensed with.

Special House Message.

The special House message with reference to Senate Joint Resolution No. 1 was brought up for consideration, the hour of 3 o'clock having arrived, same having been previously set by special order, for consideration thereof.

111 Mr. Hill moved that the message be returned to the House for the reason that the whole question was out of the hands of the Senate and the Senate therefore had no jurisdiction.

Mr. Cameron moved to amend the motion by receiving and filing the message, but not spreading it on the Journal.

Mr. Houk moved to table the amendment to the motion and on a call of the roll the motion to table prevailed by the following vote:

Ayes	15
Noes	9
Present not voting	3

Senators voting aye were: Messrs. Bradley, Burkhalter, Caldwell, Coleman, Collins, Dorris, Fuller, Harber, Hill, Houk, Matthews, Murray, Rice (of Shelby), Whitby and Wikle—15.

Senators voting no were: Messrs. Cameron, Candler, Clarke, Long, Miller, Parks, Rice (of Stewart), Summers and Mr. Speaker Todd—9.

Senators present and not voting were: Messrs. McMahan, Monroe and Stockard—3.

On a call of the roll the motion made to return the message to the House, as made by Mr. Hill, prevailed by the following vote:

Ayes	17
Noes	8
Present not voting	3

Senators voting aye were: Messrs. Bradley, Burkhalter, Caldwell, Coleman, Collins, Dorris, Fuller, Harber, Haston, Hill, Houk, Matthews, Murrey, Rice (of Shelby), Whitby, Wikle and Mr. Speaker Todd—17.

Senators voting no were: Messrs. Cameron, Candler, Clarke, Long, Miller, Parks, Rice (of Stewart) and Summers—8.

Senators present and not voting were: Messrs. McMahan, Monroe and Stockard—3.

112

Thursday, September 2, 1920.

Twenty-fifth Day.

The Senate met at 10:30 o'clock A. M. pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. A. I. Foster.

On a call of the roll all the Senators responded to their names except Messrs. Carter, Copenhaver and Patton.

On motion the reading of the Journal was dispensed with.

House Message.

The Clerk announced another message from the House with reference to Senate Joint Resolution No. 1.

Mr. Haston made the following motion in writing:

Mr. Speaker: Without undertaking to determine the question as to the validity or invalidity of the action of the House, and without undertaking to determine the legal status of Senate Joint Resolution No. 1, I move you that out of courtesy and deference that one House owes to the other, we receive the message from the House and spread the same on the Journal, as is customary in those matters.

Mr. Gwin moved to adjourn until 2:30 o'clock P. M. The motion failed.

Mr. Houk moved to adjourn until 2 o'clock P. M.

Mr. Cameron raised the point of order that no business had been transacted since the last motion to adjourn was made.

The Speaker ruled the point of order well taken.

Mr. Gwin appealed from the ruling of the Chair.

Mr. McFarland was called to the Chair, and — a call of the roll the Chair was sustained by the following vote:

113	Ayes	21
	Noes	5
	Present and not voting	3

Senators voting aye were: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Candler, Clarke, Coleman, Collins, Dorris, Harber, Haston, McFarland, McMaben, Monroe, Murrey, Parks, Rice (of Stewart), Stockard, Summers, Whitby and Wikle—21.

Senators voting no were: Messrs. Fuller, Gwin, Long, Matthews and Rice (of Shelby)—5.

Senators present and not voting were: Messrs. Hill, Miller and Todd—3.

Mr. Houk moved to amend Mr. Haston's motion as follows:

Strike out "and spread on the Journal as is customary in such cases."

Mr. McFarland moved that Mr. Houk's amendment to the motion be laid on the table and on a call of the roll the motion to table prevailed by the following vote:

Ayes	22
Noes	6
Present and not voting	2

Senators voting aye were: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Candler, Clarke, Coleman, Fuller, Gwin, Harber, Haston, Long, McFarland, Miller, Monroe, Murrey, Parks, Rice (of Stewart), Stockard, Summers, Whitby and Mr. Speaker Todd—22.

Senators voting no were: Messrs. Collins, Fuller, Hill, Houk, Matthews and Rice (of Shelby)—6.

Senators present and not voting were: Messrs. McMahan and Wikle—2.

Mr. Gwin moved to adjourn until 2:30 o'clock.

The motion failed by the following vote:

Ayes	8
Noes	22

114 Senators voting aye were: Messrs. Fuller, Gwin, Hill, Houk, Long, Matthews, Rice (of Shelby) and Wikle—8.

Senators voting no were: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Candler, Clarke, Coleman, Collins, Dorris, Harber, Haston, McFarland, McMahan, Miller, Monroe, Murrey, Parks, Rice (of Stewart), Stockard, Summers, Whitby and Mr. Speaker Todd—22.

Mr. Haston moved the previous question.

The motion prevailed.

On a call of the roll the previous motion in writing made by Mr. Haston prevailed by the following vote:

Ayes	21
Noes	4
Present and not voting	5

Senators voting aye were: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Candler, Clarke, Coleman, Dorris, Gwin, Harber, Haston, Long, McFarland, Miller, Murrey, Parks, Rice (of Stewart), Stockard, Summers, Whitby and Mr. Speaker Todd—21.

Senators voting no were: Messrs. Collins, Hill, Houk and Rice (of Shelby)—4.

Senators present and not voting were: Messrs. Fuller, McMahan, Matthews, Monroe and Wikle—5.

A motion to reconsider was laid on the table.

The following is the message from the House returning the message relative to Senate Joint Resolution No. 1:

Mr. Speaker: I am directed by motion of the House to return the following message to the Senate.

GREEN,
Clerk of House.

Mr. Speaker: I have been instructed to transmit the following message by motion of the House:

Mr. Speaker: I move you that the Clerk of the House be and is hereby instructed to notify the Senate that the House has reconsidered its action on Senate Joint Resolution No. 1—Relative
115 to ratifying the 19th Amendment and has non-concurred in the Resolution.

GREEN,
Clerk of House.

Saturday, September 4, 1920.

Twenty-seventh Day.

The Senate met at 10.00 o'clock A. M. pursuant to adjournment and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. A. I. Foster.

On motion the calling of the roll was dispensed with.

On motion the reading of the journal was dispensed with.

Consent.

Introduction of Resolutions.

By Mr. Haston: Senate Resolution No. 6, relative to rules of the House.

Mr. McFarland made the point of order that there was no quorum present.

The Chair overruled the point of order in view of the fact that the Senator from Van Buren had obtained unanimous consent to introduce and have read the resolution, and as the resolution was now being read the point of order was out of order.

On motion of Mr. Haston the rules were suspended for the immediate consideration of the resolution.

Mr. Farland again made the point of order that there was no quorum present.

On a call of the roll the result showed the presence of a quorum, the following Senators responding to their names: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Collins, Gwin, Harber, Haston, Hill, Houk, Long, McFarland, McMahan, Matthews, Murrey, Patton, Rice (of Stewart), Stockard, Summers, Whitby, Wikle and Mr.

Speaker Todd—22.

116 On motion of Mr. Haston the resolution was adopted.

A motion to reconsider was laid on the table.

The resolution, including said rules, was as follows:

Resolution No. 6.

By Haston.

Whereas, The House of Representatives went through the form on August 31, 1920, of expunging from its Journal certain motions and resolutions which it had previously adopted and also of non-concurring in Senate Joint Resolution No. 1, in which it had previously concurred, and of which concurrence it had through its clerk duly notified this Senate, said report of the House Clerk being accompanied by his certified copy of the House Journal, showing a concurrence in such resolution and further showing that the House by a majority vote of all the members to which it was entitled had refused to reconsider its action in so concurring, which report of the Clerk of the House, together with said certified copy of the House Journal has heretofore been spread on the Journal of this Senate; and

Whereas, said House of Representatives on said date, August 31, 1920, undertook to expunge from its Journal certain of the motions and resolutions duly entered thereon and certified by the Clerk of the House to this Senate and spread on its Journal, thereby undertaking to destroy as legal evidence a part of the record the House had itself made and certified to this Senate; and

Whereas, The Senate is of the opinion that such procedure in so far as it undertook to expunge from the House Journal the record of what had previously transpired was and is wholly null and void and in express violation of the rules of the House:

It is therefore ordered that the rules of the House relating to motions to expunge be spread on the Journal of this Senate, such rules showing that it requires a majority of all the members to which the House is entitled to lawfully adopt an expunging resolution and which rules are as follows:

117 Rule 65 of the House "Rules of Order" reads as follows:

"If any question shall arise which is not provided for in these rules, the same shall be governed by Roberts' 'Rules of Order,' which is hereby adopted." The House has not included in its 'Rules of Order' any provision with regard to rescinding or expunging orders or resolutions previously adopted, but by Rule 65 has 'adopted' Roberts' Rules on those subjects. They are perfectly clear and cannot be misunderstood. They can be found in Rule 11 on page 52 of his Revised Edition; also in Rule 37 on pages 169 and 170.

Said Rule 11 refers to main or principal motions and thus states the vote by which they must be adopted: 'As a general rule they require for their adoption only a majority vote—that is, a majority of the votes cast; but amendments to constitutions, by-laws and rules of order already adopted, all of which are main motions, require a

two-thirds vote for their adoption, unless the by-laws, etc., specify a different vote for their amendment, and the motion to rescind action previously taken requires a two-thirds vote, or a vote of a majority of the entire membership, unless previous notice of the motion has been given.'

Said Rule 37 refers to motions to rescind, repeal or annul and is as follows:

'Any vote taken by an assembly, except those mentioned further on, may be rescinded by a majority vote, provided notice of the motion has been given at the previous meeting or in the call for this meeting; or it may be rescinded without notice by a two-thirds vote of a majority of the entire membership. The notice may be given when another question is pending, but cannot interrupt a member while speaking. To rescind is identical with the motion to amend something previously adopted, by striking out the entire by-law, rule, resolution, section, or paragraph, and is subject to all the limitations as to notice and vote that may be placed by the rules on similar amendments. It is a main motion without any privilege, and therefore can be introduced only when there is nothing else before the

assembly. It cannot be made if the question can be reached 118 by calling up the motion to reconsider which has been previously made. It may be made by any member; it is debatable, and yields to all privileged and incidental motions; and all of the subsidiary motions may be applied to it. The motion to rescind can be applied to votes on all main motions, including questions of privilege and orders of the day that have been acted upon, and to votes on an appeal, with the following exceptions: Votes cannot be rescinded after something has been done as a result of that vote that the assembly cannot undo; or where it is in the nature of a contract and the other party is informed of the fact; or, where a resignation has been acted upon, or one has been elected to, or expelled from, membership or office, and was present or has been officially notified. In the case of expulsion, the only way to reverse the action afterwards is to restore the person to membership or office, which requires the same preliminary steps and vote as is required for an election.

Where it is desired not only to rescind the action but to express very strong disapproval, legislative bodies have, on rare occasions, voted to rescind the objectionable resolution and expunge it from the record, which is done by crossing out the words, or drawing a line around them and writing across them the words, 'Expunged by order of the assembly,' etc., giving the date of the order. This statement should be signed by the Secretary. The words expunged must not be so blotted as not to be readable, as otherwise it would be impossible to determine whether more was expunged than ordered. Any vote less than a majority of the total membership of an organization is certainly incompetent to expunge from the records a correct statement of what was done and recorded and the record of which officially approved, even though a quorum is present and the vote to ex-

punge is unanimous.' Roberts' Rule 47, page 201 relative to resolutions that violate the by-laws of an assembly is as follows:

"Votes that are null and void even if unanimous. No motion is in order that conflicts with the laws of the nation, or state, or with the assembly's constitution or by-laws, and if such a motion is adopted even by a unanimous vote, it is null and void."

119 STATE OF TENNESSEE,
County of Davidson:

I, W. M. Carter, do hereby certify that I am and was prior to and during the Special Session of the General Assembly of the State of Tennessee, held at the Capitol at Nashville, beginning the 9th day of August, 1920, the Clerk of the Senate of said General Assembly; that it was my duty as such Clerk to keep the Journals showing the official action taken by said Senate in all matters; that the extracts hereinabove set forth purporting to be made from the Senate Journals are true and perfect copies of the entries made and appearing upon said Journals; that said entries show all the proceedings had with respect to the proposed adoption of the so-called Suffrage Amendment, or Nineteenth Amendment, to the United States Constitution.

Witness my hand this 27th day of October, 1920.

W. M. CARTER,
Clerk of the Senate.

STATE OF TENNESSEE,
County of Davidson:

I, Ike Stevens, Secretary of State of the State of Tennessee, do hereby certify that the foregoing attestations and certificates made by J. D. Green and W. M. Carter, respectively, are in due form and by the proper officials; and that said Green and Carter were at the time of the proceedings hereinabove shown, Clerks of the House of Representatives and Senate of the General Assembly of the State of Tennessee, respectively; that said Green & Carter were, respectively, the keepers of the Journals officially showing the action of the House and Senate.

In witness whereof I have hereunto set my hand and by order of the Governor have hereunto set the Great Seal of the State of Tennessee this 27th day of October, 1920.

[SEAL.]

IKE B. STEVENS,
Secretary of State of the State of Tennessee.

120 The petitioners further offered in evidence the Journals of the Senate and House of Representatives of West Virginia at the Extraordinary Session of 1920, parts of which follow:

West Virginia Legislature, Senate Journal, Extraordinary Session, 1920.

“Charleston, W. Va.,
Friday, February 27th, 1920.

“Pursuant to the proclamation of His Excellency, Governor Jno. J. Cornwell, hereinafter set forth, dated February 20, 1920, convening the Legislature of the State of West Virginia in extraordinary session on Friday, the twenty-seventh day of February, 1920, the Senate this day assembled in its chamber in the Capitol building at the City of Charleston, at the hour of 12 o'clock, meridian, and was called to order by the President, Hon. Charles A. Sinsel.

“Whereupon,

“The President laid before the Senate the proclamation of the Governor, which was read by the Clerk, and is as follows:

“United States of America,

“State of West Virginia,

“Executive Department.

A Proclamation.

“By the Governor.

“I, Jno. J. Cornwell, Governor of West Virginia, by virtue of the authority conferred upon me by Section 7 of Article 7 of the Constitution and in pursuance thereof, do hereby call the Legislature of said State to convene in its chambers in the Capitol, in the City of Charleston, at noon, Friday, the twenty-seventh day of February, one thousand nine hundred and twenty, to consider and act upon the following subjects:

121 “First. To consider and enact legislation dealing with the high cost of living. To make the taking of excess profits on the necessities of life a misdemeanor and to fix penalties for the violation of the provisions of such statutes as may be enacted on the subject.

“Second. To authorize the Independent School District of Ravenswood to erect a new school building and to levy a tax or a bond issue sufficient for that purpose.

“Third. To amend the charter of the City of Charleston relating to the paving of its streets and alleys.

“Fourth. To amend the charter of the City of Martinsburg relating to paving and sewage and the method of paying for same.

“Fifth. To consider and ratify the Amendment to the Constitution of the United States, extending the right of suffrage to women and to pass all appropriate legislation making the same effective in West Virginia for all purposes.

"Sixth. To amend, if deemed advisable, the corporation laws of the State to allow the issue of non-par stock and to fix the basis of the tax on same.

"Seventh. To make necessary appropriations of public moneys to defray the expenses of the special session.

"In Testimony whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed.

Done at the Capitol, in the City of Charleston, this the twentieth day of February, in the year of our Lord, one thousand nine hundred and twenty, and in the fifty-seventh year of the State.

By the Governor:

JNO. J. CORNWELL,
Governor.

[SEAL.] HOUSTON G. YOUNG,
Secretary of State.

"Prayer was offered by Rev. T. C. Johnson, Pastor Emeritus of the Baptist Temple, of Charleston.

122 "On a call of the roll of the Senate the following members answered to their names:

"Messrs. Sinsel (President), Arnold, Burgess, Burr, Chapman, Coalter, Coburn, Dodson, Duty, Fox, Frazier, Gribble, Harman, Harner, Hough, Hunter, Johnson, Kump, Luther, Morton, Poling, Sanders, Scherr, Staats, Stewart and York—26.

"Absent:

"Messrs. Block, Lewis, Montgomery and Vencill—4.

"The President announced that a majority of the members elected to the Senate having answered to their names, a quorum was present."

(By concurrent resolution of both Houses a joint committee was appointed to wait on the Governor and notify him that the Legislature is in session. The Governor then presented a message to the House, and also a communication to them transmitting the official copy of House Joint Resolution No. 1 of the 66th Congress of the United States of America, it being a joint resolution proposing an amendment to the Constitution extending the right of suffrage to women.)

"On motion for leave, Mr. Harner offered the following:

"Senate Joint Resolution No. 1—Ratifying the proposed amendment to the constitution of the United States, extending the right of suffrage to women.

"Whereas, The Sixty-sixth Congress of the United States of America at its first session, in both houses, by a constitutional majority of two-thirds thereof, has made the following proposition to amend the constitution of the United States of America in the following words, to wit:

"Joint Resolution Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

"Resolved by the Senate and House of Representatives of 123 the United States of America in Congress Assembled (Two-thirds of each House concurring therein), That the following article is proposed as an amendment to the constitution, which shall be valid to all intents and purposes as part of the constitution, when ratified by the legislatures of three-fourths of the several States.

"Article —. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation." Therefore, be it

"Resolved by the Legislature of West Virginia:

"That the said proposed amendment to the constitution of the United States of America be and the same is hereby ratified.

"Resolved, That certified copies of the foregoing preamble and resolution be forwarded by the Governor of the State of West Virginia to the President of the United States, the Secretary of State of the United States, the President of the Senate of the United States, and the Speaker of the House of Representatives of the United States.

"Which resolution, under the rules, lies over one day."

"Saturday, February 28, 1920.

(On this day, and on Monday, March 1, 1920, numerous petitions and telegrams were received and filed either favoring or opposing the ratification of the amendment which are omitted from this record.)

"Monday, March 1, 1920.

"Senate Joint Resolution No. 1—'Ratifying the proposed amendment to the Constitution of the United States, extending the right of suffrage to women,'

"Coming up in regular order for consideration, was read by the Clerk.

"The question being, 'Shall the resolution be adopted?'"

124 "On a call of the roll,

"The ayes were:

"Messrs. Sinsel (President), Coburn, Dodson, Duty, Fox, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencil—13.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Harmer, Hough, Hunter, Lewis, Luther, Scherr and York—15.

"Absent not voting:

"Messrs. Bloch and Montgomery—2.

"After the vote had been verified and before the result was announced, Mr. Harner said:

"Mr. President: In order that I may have the privilege, under the rules of the Senate, to move a reconsideration of the vote just taken, I desire to change my vote heretofore cast in favor of the resolution, and now vote 'No.'

"So a majority of the members present not having voted in the affirmative, the resolution was rejected.

"Pending the calling of the roll, when his name was called Mr. Coulter said:

"Mr. President: Never as long as I am a member of this Senate, shall I knowingly cast a vote upon any question in direct opposition to the expressed will of my constituents. At the same election at which I was elected as a member of this body, the proposed amendment to the Constitution of West Virginia, for the enfranchisement of women, was voted upon. In each of the counties of my district an overwhelming majority of the voters of both dominant political parties registered their protest against such an amendment. Upon this question my constituents have most emphatically and decisively expressed themselves. No matter what I think about the question personally, I should be a traitor to our form of government, to the oath I have taken, and to my own conscience

and manhood if I should go directly contrary to the expressed will of those who sent me here. I take no thought of the question of political expediency. I am little concerned about what other States do or don't do upon this question. The Congress of the United States cannot speak upon this question for the voters of West Virginia, or of my district.

"I represent the counties of Mercer, Monroe, Raleigh and Summers, and my people during the year 1916 had an opportunity to express their sentiments on the question now before the Senate. I have assumed—in fact I know—that such expression, as was indicated by their registered votes on the question, represented their unbridled sentiments, and I should feel derelict in my duty toward them in not at all times—when consistent with the duty I owe my state and nation—complying with their wishes and desires. Personally, I have been inclined to vote for ratification of this amendment; but when I look the question squarely in the face, and realize that out of 16,872 votes cast in my district on the question of the adoption of the woman's suffrage amendment to our Constitution, I find that 12,236 or 73% of my voting constituents voted against the same. Until this question is put in such shape that the voters of this State can again express themselves upon it, and shall reverse the decision they have already rendered, I shall feel it my duty to follow the will of the people as already expressed at the polls by more than ninety thousand majority. I vote 'No.'

"Pending the calling of the roll, when his name was called, Mr. Hough said:

"The proposed adoption of the woman's suffrage amendment to the Constitution of the United States of America is not being done in accordance with the spirit and provisions of either the Federal

Constitution or the Constitution of the State of West Virginia, both of which I am under oath to protect and support in the legislature of West Virginia.

"The Federal Constitution and the Constitution of West Virginia both have obstacles to their being changed by sudden action, great excitement or deep resentment, and both make the will of 126 the people supreme, as well; they are carefully framed in order that the people's real will and considered judgment and not their transient impulses, may be ascertained along with the action of Congress and the Legislature before amendments are finally made.

"The considered judgment and will of the people of West Virginia upon woman suffrage is expressed to this legislature by a vote of 161,607 against to 63,540 for it at the same election when one-half of the membership of this Senate was chosen. I personally feel my vote for ratification of the amendment would be a violation of my oath (and have the appearance of seeking the plaudits of misnomered democracy, which, as a rule analyzes into nobocracy); but we are a republic, pure and simple—a representative government—and as such I will support and defend the supreme will of 161,607 West Virginians against the clamour emanating from the 63,540 by opposing the amendment and vote 'No.'

"Pending the calling of the roll, when his name was called, Mr. Kump said:

"Mr. President and Gentlemen of the Senate: I personally favor the ratification of the 19th Amendment to the Constitution of the United States.

"However, common honesty compels me to declare that, in my opinion, a majority—but not an overwhelming majority—of the voters of my senatorial district, are against the ratification of this amendment, and if this alone was the only element entering into my decision, I would cheerfully yield my personal views and record my vote against this amendment, but I am impelled by other, and to me, more convincing reasons, why I should vote for ratification.

"We are nearing the close of a great contest to determine whether or not equal suffrage shall be adopted in the nation. Governor Cornwell, a democrat, the greatest of all the great governors developed during the terrible war through which we have just passed—my friend and my neighbor—has convoked a republican legislature in extraordinary session to ratify this amendment. He has 127 made it clear that he wants his friends to vote for ratification. He is the titular leader of the Democratic party in West Virginia, and I am a member of that party.

"My friend, my neighbor and my chief has indicated what I should do, and I will carry out his wish, especially so when justice will be attained thereby. Our action in ratifying the pending amendment is only simple justice, long delayed, and equal suffrage, in my opinion, is eternally right. I vote 'Aye.'

"Pending the calling of the roll, when his name was called, Mr. Luther said:

"I wish to state that I am unalterably opposed to woman suffrage

and I will put forth every legitimate effort at my command to protect woman from herself.

"To give her the 'advantage' of the ballot would be robbing her of so many of her charms that the change would put her practically on the same footing with man, thus robbing mankind of its chief home comfort and support, and leaving us with no one to supply the inspiration necessary to accomplish things in a universe already over-run with vexatious problems both little and large.

"And then, taking the Bible as an indisputable authority on all the good things of life; able students have searched its pages carefully for something that would throw some light on the question of woman suffrage, but nothing has been found that could possibly be construed as even suggesting the participation of woman in the conduct of the political affairs of a nation.

"Coming on down the ages, I find that France, at one time, was one of the most moral and upright nations on the face of the globe, but when women danced upon the scene as participants in the public affairs of the nation, this record gradually began to disintegrate and the religious prestige of the country rapidly gave way to the forces of evil. Statistics show that through the neglect of mothers, who gave their time to public affairs rather than to home virtues and comforts, there are more street walkers in France than there are cigarette smokers among the male population of that country, and that at the present rate of degeneration, by actual figures, compiled by 128 the best mathematicians in the world, France will be extinct as a moral force within eighty years, unless there is something done to check the awful crime of race suicide.

"The same conditions will be repeated in the United States under the same circumstances. We already have a sample of the workings of woman suffrage in the State of Colorado. Women have been 'enjoying' the ballot in the state, and what is the result? Colorado stands at the head of the column in the number of divorces granted, and it is a settled fact that a large majority of these divorce proceedings were instituted because of the lewdness of the female participant in the matrimonial venture. The beginning of race suicide in this country dawns with the day that women march to the polls to cast their first ballot.

"The counties of the Sixth Senatorial District which I represent including my native county, that of McDowell, cast in the election of 1916, on the proposition of woman suffrage 1,436 for and 1,662 against; the county of Mingo cast 712 votes for and 2,609 against; the county of Wayne cast 853 for and 3,175 against; the county of Wyoming 399 for and 810 against.

"The total vote of the Sixth Senatorial District was 3,400 for ratification and 11,226 against ratification, which is an average of 75% against ratification.

"I would be unworthy of the confidence of my constituents if I did otherwise than as they have expressed their sentiments on the question of woman suffrage, and I now cast my vote 'No.'

"Pending the calling of the roll, when his name was called Mr. Scherr said:

"Mr. President: I desire to make a brief statement in explanation of my vote and ask that it be printed in the Journal of today's proceedings.

"The resolution before us for our consideration deals with a fundamental question of the highest importance, affecting the very foundation of our civic life—the most important question to *any* kind that was ever presented to a West Virginia legislature; 129 the ratification or rejection of the Anthony suffrage amendment to the federal constitution.

"In reaching my conclusions I weighed carefully the arguments presented both for and against ratification. The great point at issue and the one that should concern us most is whether or not the people of West Virginia desire equal suffrage.

"I firmly believe in the rule of majorities and regard the attempt of the minority to rule, as dangerous and unwarranted by our system of Government.

"So, in dealing with this most important subject at this time, as representatives of the people of the great State of West Virginia, and not of some other State, our attention is called to the fact that at the last general election the registered will of these people defeated woman suffrage by a majority exceeding 98,000 votes—the largest majority ever given any proposition in the history of our State—and there is not the slightest evidence that this sentiment has changed. Every senatorial district represented by the members of this body gave a decided majority against it, so what warrant has this legislature to set aside a verdict of the people so emphatically expressed?

"The fact that other states have voted differently, and desire our legislature to overturn the will of the people of this state, expressed only three years ago, is a poor argument to induce a legislator to give affirmative support to this federal amendment.

"Political expediency has been urged by some of the leaders of both of the dominant political parties. If political or party expediency is to throttle the will of a sovereign people—disregarding their wishes as expressed by the ballot—it is an expediency to which I cannot subscribe, and one that is not consistent with our republican form of government. Principle and the will of the majority, to my mind, should never be subordinated to political or party expediency.

"So, Mr. President, in view of these facts, and obeying the mandates of what I believe to be a majority of the men and women of West Virginia, I vote 'No.' 130

"On motion of Mr. Harmer the Senate adjourned until tomorrow, Tuesday, March 2, 1920, at 2 o'clock P. M."

Wednesday, March 3, 1920.

"Mr. Harmer moved that the Senate reconsider the vote by which it on Monday last rejected,

"Senate Joint Resolution No. 1—'Ratifying the proposed amend-

ment to the Constitution of the United States, extending right of suffrage to women,

"And,

"On that question,

"Mr. Gribble demanded the ayes and noes.

"Whereupon,

"Mr. Harmer moved that the further consideration of the resolution (S. J. R. No. 1) be made a special order for tomorrow, Thursday, March 4, 1920, at 2 o'clock P. M.

"And,

"On that question,

"Mr. Arnold demanded the ayes and noes.

"The demand being sustained, they were ordered and taken as follows:

"The ayes were:

"Messrs. Sinsel (President), Coburn, Dodson, Duty, Fox, Harmer, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Venable—14.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Hough, Hunter, Lewis, Luther, Scherr, and York—14.

"Absent and not voting:

"Messrs. Block and Montgomery—2.

"So, two-thirds of the members present not having voted in the affirmative, the motion to make the further consideration of the resolution a special order did not prevail.

"The question then recurring on the motion of Mr. Harmer that the Senate reconsider the vote by which it on Monday last rejected Senate Joint Resolution No. 1.

"The ayes and noes having been demanded by Mr. Gribble and the demand sustained, they were ordered and taken.

"Pending the calling of the roll, when his name was called, Mr. Burgess sent to the Clerk's desk an explanation of his vote, in writing and requested that the same be spread on the Journal.

"Pending the reading of the same by the Clerk, Mr. Harmer interposed an objection to its insertion in the Journal, on the ground that it was argumentative and not an explanation of the gentleman's vote.

"The Chair ruled that Mr. Burgess had a right, as a member, to have an explanation of his vote recorded in the Journal.

"The explanation of Mr. Burgess is as follows:

"Mr. President: I want it understood that I believe in the dignity, the honor, the glory and the supremacy of American Womanhood. It is because of that belief, which is so strong that it has become a part of my very being, that I will presently cast my vote as I do.

"I believe in the home—the American home and the American fireside. The stability, the strength of American institutions, depend upon the kind and character of our homes. Mr. President, I shall shortly cast my vote for the homes of this great nation.

"Again I stand for the American baby. The home without the prattle of babes and the laughter of little children is a hollow mockery. A lot of platform people will tell you that every baby has the right to be well born; it is true, but they have another and greater right: they have the right to have a mother's care and a mother's love. Mr. President, I shall shortly have the honor and the
132 courage in the face of this powerful lobby to cast my vote for the American baby.

"Up in Wetzel county, on one of her mountain tops there is a humble home, and in that home there is an old woman. Her form is bent with age, her face is furrowed with the trace of many cares; her voice is broken; she totters and her step is slow; she is weary with the journey; her eyes are dim with age, her hands are gnarled and crooked. No, she is not pretty, but she's my mother, and she has a heart of gold, Mr. President. She is not only my mother, but she is the mother of my fourteen brothers and sisters.

"Up in the city of Moundsville there is another home and another mother—a good mother, a true mother, a sweet mother—the mother of my children.

"Mr. President, when a woman goes down into the valley of the shadow; when she risks her life for a life; when she sleeps with death; when she tears from underneath her heart a child—endows it with a spark of human life—we call her by that blessed holy name of mother, and, Mr. President, when I go back home; when I see these mothers of mine, I want, and I am going to look them squarely in the eyes and say: 'I have been over the long trail; I have been to the wigwam of the great chief; I have heard the sirens sing; they wanted to put another burden on your backs; they wanted to make life harder for you; they wanted to make your paths through lands beset by dangers on every side; but, mother and wife, there were brave men there, men good and true, who were not beguiled by the siren's song, yet by her laughter—men big enough, brave enough to defy the threat of kings, and by their good help, we have kept the womanhood of West Virginia, on that high plane where it has ever been, and where I pray God it may ever stay—away from corruption's blot; away from those who play the game of politics for place, and power, and pomp and circumstance. And, Mr. President, I will not only receive the thanks and blessings of these mothers of mine, but the thanks and blessings of a large majority of the mothers, the wives and the sweethearts of my district; not only their thanks and blessings, but the
133 thanks and blessings of a majority of the voters of my district, who, on the same day and at the same polls, when they voted for me and elected me to the Senate of West Virginia, by their votes overwhelmingly declared themselves against woman suffrage.

"Mr. President, I now cast my vote for the womanhood of West

Virginia. I want to vote for the babies of West Virginia, the boys and the girls of West Virginia. I want to vote for the wives and the mothers of West Virginia, and, Mr. President, I want to vote for the homes and firesides of this great nation. I now have the honor and the privilege and the right to vote and do vote, 'No.'

"Mr. Morton moved that the announcement of the vote be postponed until tomorrow, Thursday, March 4, 1920, at 2 o'clock P. M.

"Mr. Gribble raised the point of order that the same motion had already been made and passed upon by the Senate.

"The Chair ruled that the point of order was not well taken.

"The question being on the motion of Mr. Morton that the announcement of the vote on the reconsideration of the Senate Joint Resolution No. 1, be postponed until tomorrow, Thursday, March 4, 1920, at 2 o'clock P. M.

"On that question.

"Mr. Gribble demanded the ayes and noes.

"The demand being sustained, they were ordered and taken as follows:

"The Ayes were:

"Messrs. Sinsel (President), Coburn, Dodson, Duty, Fox, Harmer, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencil—14.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Hough, Hunter, Lewis, Luther, Scherr and York—14.

134 "Absent and not voting:

"Messrs. Bloch and Montgomery—2.

"So, a majority of the members present not having voted in the affirmative, the motion to postpone did not prevail.

"Mr. Harmer then moved that the announcement of the vote be postponed until Thursday, March 4, 1920, at 3 o'clock P. M.

"Which motion the Chair ruled was not in order.

"Mr. Harmer then moved that the announcement of the vote be postponed until Friday, March 5, 1920, at 2 o'clock P. M.

"Which motion the Chair ruled was not in order.

"Whereupon, the vote on the reconsideration of the vote on Senate Joint Resolution No. 1 was announced as follows:

"The ayes were:

"Messrs. Sinsel (President), Coburn, Dodson, Duty, Fox, Harmer, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencil—14.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Hough, Hunter, Lewis, Luther, Scherr and York—14.

"Absent and not voting:

"Messrs. Bloch and Montgomery—2.

"So, a majority of the members present not having voted in the affirmative, the motion to reconsider did not prevail."

"Monday, March 8, 1920.

"A message from the House of Delegates, by Mr. John, announced the adoption by that body and requested the concurrence of the Senate in

135 "House Joint Resolution No. 1, 'Ratifying the proposed amendment to the Constitution of the United States extending the right of suffrage to women.'

"Mr. Scherr introduced the following resolution:

"Senate Concurrent Resolution No. 2.—'Raising a joint committee to wait upon the Governor.'

"The business of this special session has been completed and for the last four days both branches of the legislature have been idle, and a large number of members of the House have departed for their homes. For the legislature to remain in longer session would be to waste the public funds and the time of members alike, without accomplishing anything which the people desire or approve.

"The resolution to ratify the Nineteenth Amendment to the Federal Constitution was lost by a vote in the Senate of 15 to 13. Reconsideration was moved and failed. According to a rule of this body, which has governed its procedure throughout the history of our State, this subject can not be re-introduced at this session. Rule 12 provides as follows:

"52. The question being once determined, must stand as the judgment of the Senate, and cannot during the session be drawn again into the debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding days.' "

By no means can a matter once finally disposed of by the Senate at this session, in the manner described by this rule, be brought up again except by the radical action of changing the ancient rule itself. Would it be wise, would it be dignified or decent, for the purpose of retrieving any cause, to alter a rule which—ever since a time prior to the beginning of the American Government—has been regarded as perhaps the greatest safeguard in the proceedings of legislative bodies under a free government? Thomas Jefferson, in his 'Manual,' the text of which is commonly printed in books of law and reference along with the Declaration of Independence and the Constitution of the United States, cites the rule:

136 " 'In parliament a question once carried can not be questioned again at the same session, but must stand as the judgment of the House.' "

And he spoke of the (false):

" 'sense that the right of reconsideration is a right to waste the time of the House in repeated agitations of the same question, so

that it shall never know when a question is done with, should induce them to reform this anomalous proceeding'."

Of the grave and vital importance of adhering to the rules of legislative procedure, Jefferson, in his great 'Manual,' says:

"So far the maxim is certainly true, and is founded on good sense; that it is always in the power of the majority, by their numbers to stop any improper measures proposed on the part of their opponents. The only weapons by which the minority can defend themselves against similar attempts from those in power are the forms and rules of proceeding which have been adopted as they were found necessary, from time to time and are become the law of the House, by a strict adherence to which the weaker party can only be protected from those irregularities and abuses which these forms were intended to check and which the wantonness of power is but too often apt to suggest to large and successful majorities. And whether these forms be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by, than what that rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or capriciousness of members. It is very material that order, decency, and regularity be preserved in a dignified public body."

"If the Senate, continuing in session until the time arrives, if it does arrive, when a bare majority can alter the historic provision contained in Rule 52, the Senate would, by venturing upon such radical and revolutionary action, commit a single outrage. The consequences of its action would not end with the present issue, but would rise to vex the members of this body and to open the
137 doors to fresh wrongs against orderly and decent government and the most sacred rights of the people themselves."

"The rule which is herein cited was framed by a parliamentary body prior to the inception of our own government, and was successively adopted by the Federal authority and by the authorities of the several states. It is as old as popular freedom. It is a rule heretofore held everywhere as inviolate as any section of the Federal Constitution itself. It was not made to be lifted at will; to do so would be to subject our government to all the dangers which come from tyrannous majority action."

"The orderly and decent course is for this Senate—having accomplished all that it can accomplish by orderly procedure under its rules—to adjourn without delay. To continue longer in session under the circumstances which prevail would be a violent and arbitrary course, which the people whom we represent could not fail to disapprove. Therefore, be it

"Resolved, by the Senate, the House of Delegates concurring therein:

"That a joint committee of five, consisting of two on the part of the Senate, to be appointed by the President thereof, and three on

the part of the House of Delegates, to be appointed by the Speaker thereof, be appointed for the purpose of notifying the Governor that the legislature is ready to adjourn sine die, having completed its labors, and ask him if he has any further communication to make.

"Pending the reading of the resolution by the Clerk, objection was made thereto by the Senator from Harrison.

"Mr. Harmer: Mr. President, I rise to a point of order, and the point is that the resolution is an argument and not a resolution.

"Mr. Scherr: It is simply stating the facts as carried out.

"The President: It sounds very much to me as though it is an argument.

138 "Mr. Scherr: I think the Senate has the right to consider and determine that.

"The President: It sounds very much like an argument of the question, and I will simply put the matter to a vote of the Senate to decide whether they desire this resolution accepted or not at this time.

"Mr. Gribble: Mr. President—Before this matter can be properly directed to the attention of the Senate, to pass upon it, it will be necessary to complete the reading of it. We don't know what we will be called upon to pass upon here until the reading of the resolution is completed.

"Mr. Harmer: Mr. President, let the Clerk finish it and at the proper time I will make my objection.

"The President: All right; let the Clerk proceed with the reading of it.

"Thereupon, the Clerk completed the reading of the resolution.

"Mr. Harmer: Now, Mr. President, my point of order is, that all of the paper read prior to the resolution, is improper, as it is an argument, attempted to be brought in as a part of the resolution, and I therefore object to its being considered. I have no objection to the resolution, but the preamble, you might call it, to the resolution is purely an argument.

"The President: The resolution is not being considered, Senator, and under the rules, all resolutions—unless the motion is made otherwise—must lie over one day.

"Mr. Harmer: That is the point that I am objecting to. I am objecting to its even being offered as a resolution. If you want an argument, then it should be brought under the rules.

"Mr. Gribble: I rise to a point of order. The resolution is not debatable.

"Mr. Harmer: That is the point that I raised; it is not debatable.

"The President: The resolution is not debatable that is unquestioned, and that is what I was waiting for.

139 "Whereupon,

"Mr. Scherr introduced the following:

"Resolved: That a committee of two be appointed by the President to inform the House of Delegates that the Senate has completed its business and is now ready to adjourn sine die.

"Mr. Harmer: I did not understand whether there has been an action on the other resolution. My point of order is the same as the Senator from Doddridge raised—that this resolution carries debate and puts it into the record, and I ask that the Chair will rule that the resolution be stricken out.

"Mr. Gribble: I raise the same point of order—that the resolution is not debatable.

"Mr. Harmer: It is not a resolution; it is an argument.

"The President: The only way, in my opinion, that this could be acted upon, would be to suspend the rules and take it up for immediate consideration, as under the rules of the Senate it has to lie over one day before it can be taken up and acted upon, and I will therefore rule that the resolution will lie over one day under the rules of the Senate.

"The President: Are there any other motions?

"Mr. Harmer: Mr. President, I desire to give notice that at some time after today I will offer a motion to amend Senate Rule No. 3, so as to read as follows:

"52. The question being once determined, must stand as the judgment of the Senate, and cannot during the session, be drawn again into debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding business days.

"Provided, however, that nothing contained in this rule shall apply to any question relating to any proposed amendment to the Constitution of the United States of America."

(The motion of Mr. Harmer was never afterwards offered.)

140

"Wednesday, March 10, 1920.

"House Joint Resolution No. 1—'Ratifying the proposed amendment to the constitution of the United States extending the right of suffrage to women.'

"Coming up in regular order for consideration, was read by the Clerk.

"The question being, 'Shall the resolution be adopted?'

"Mr. Gribble said: I arise to a question of personal privilege and raise the point of order that under our rules, where the same matter has been once considered and adjudicated or passed or rejected by this Senate, the same question cannot be taken up and considered a second time. The rule is very plain and explicit on this proposition. This same resolution was passed on by this Senate and rejected; also a motion was made at a subsequent date to reconsider the same which motion also failed. Under the rules this resolution now cannot be considered by this Senate.

"Mr. Harmer: Mr. President—The rule referred to by the Senator from Doddridge does not apply, in my judgment. That applies to questions about matters which the President has announced and the Senate voted upon. This is a House Joint Resolution, now before the Senate for the first time, and it has never been considered before. Besides that, Mr. President, this is an amendment to the constitution

of the United States. It is not here by reason of the fact that the governor put it in his call alone, but is here under the mandate and authority of the constitution of the United States itself, which provides that Congress—when two-thirds of the members of both houses submit an amendment—that they provide that it be submitted to the legislatures of the several states, and it is adopted when three-fourths of the states have ratified the same. Now, there are a number of precedents by which, when a resolution of this kind comes before the legislature and is voted down, that it can come up again at the same session of the legislature. In fact of all the nineteen amendments that have been offered to the Constitution of the United States but one had any limitations as to when it should be ratified by the several state legislatures, and that was the Eighteenth or

141 Prohibition Amendment, which gave the states only seven years in which to ratify. I say that the precedents are such that legislatures have considered the matter at the same session, and I cite as an illustration the State of New York, Virginia, Alabama and various other states. They submitted the question of the amendment to the constitution; they then voted it down, called it up again and voted again. It is not by reason of our rule; it is not by reason of our governor's calling us here in this extra session, but it is by reason of the Congress of the United States having exercised its authority under the Constitution of the United States that this matter is before *his* legislature and will stand here for our consideration or for the consideration of future legislatures until it is ratified.

"The President: Under ordinary circumstances, had this resolution originated either in the Senate or in the House, I would feel that I should know to pass upon this point of order. I have studied this question to quite an extent; have consulted some of the best lawyers that I know; have consulted seven or eight of the lawyers of our own body, and have seen some decisions in connection with Federal amendments, and it has placed me in such a position that I hardly know what to do; so I have determined instead of deciding this point of order myself, to submit it to the vote of this Senate and ask them to express just what they believe in the matter. I am therefore going to ask the Clerk to call the roll, upon what the rule is.

"Mr. Gribble: Mr. President—I insist upon the Chair passing upon this question. The Chair is here under these rules to decide these questions, and I refer to Reed's Rules of Order, Sections 183 and 184.

"The President: I feel that the Chair can place a part of the responsibility of a question of this kind upon the Senate, and have determined to do so. Therefore, I will not rule upon the point of order and will ask that the roll be called. I maintain that I am within my right and will ask the Senate to decide this question.

"Mr. Gribble: I would like the record to show that I have insisted upon the Chair's passing upon this question, and have cited Reed's Rules of Order, Sections 183 and 184 governing this question, which the President has declined to entertain.

"The President: There is no objection, whatever, to the record showing that.

"The question being on the point of order raised by Mr. Gribble.

"On a call of the roll.

"The ayes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Hough, Hunter, Lewis, Luther, Scheer and York—14.

"The noes were:

"Messrs. Sinsel (President), Bloch, Cobun, Dodson, Duty, Fox, Harmer, Johnson, Kump, Morten, Poling, Sanders, Staats, Stewart and Vencill—15.

"So, a majority of the members present not having voted in the affirmative the point of order raised *be* Gribble was not sustained.

"The resolution (H. J. R. No. 1) was then adopted:

"On adoption of the resolution,

"The ayes were:

"Messrs. Sinsel (President), Bloch, Cobun, Dodson, Duty, Fox, Gribble, Harmer, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencill—16.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Harman, Hough, Hunter, Lewis, Luther, Scheer, and York—13.

"Before the announcement of the vote.

"Mr. Gribble said: For the purpose of making a motion to reconsider this vote, I desire to change my vote from 'No' to 'Aye' and request that this statement go into the record.

143 "Mr. Harmer: I move that the vote by which this resolution was adopted, be reconsidered.

"On that question,

"Mr. Gribble demanded the ayes and noes.

"The demand being sustained, they were ordered and taken as follows:

"The ayes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Harman, Hough, Hunter, Lewis, Luther, Scherr and York—13.

"The noes were:

"Messrs. Sinsel (President), Bloch, Cobun, Dodson, Duty, Fox, Gribble, Harmer, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencill—16.

"So a majority of the members present not having voted in the affirmative, the motion to reconsider did not prevail.

"Ordered, that Mr. Harmer communicate to the House of Delegates the adoption of the resolution by the Senate.

"Mr. Harmer moved that the Senate adjourn until tomorrow, Thursday at 10 o'clock A. M.

"And,

"On that question,

"Mr. Coalter demanded the ayes and noes.

"The demand being sustained, they were ordered and taken as follows:

"The ayes were:

"Messrs. Sinsel (President), Bloch, Cobun, Dodson, Duty, Fox,

Harnet, Johnson, Kump, Morton, Poling, Sanders, Staats, Stewart and Vencill—15.

"The noes were:

"Messrs. Arnold, Burgess, Burr, Chapman, Coalter, Frazier, Gribble, Harman, Hough, Hunter, Lewis, Luther, Scheer and York—14.

114 "So a majority of the members present having voted in the affirmative, the motion to adjourn prevailed.

"Whereupon, the President declared that the Senate stood adjourned until tomorrow, Thursday, March 11, 1920, at 10 o'clock A. M.

Thursday, March 11, 1920.

"Mr. Poling, from the Joint Committee on Passed Bills (otherwise known as the Joint Committee on Enrolled Bills), submitted the following report, which was received:

"Your Joint Committee on Passed Bills (otherwise known as the Joint Committee on Enrolled Bills), have examined and found truly enrolled;

"(H. B. No. 16.)

"And,

"(H. J. R. No. 1)—'Ratifying the proposed amendment to the Constitution of the United States extending the right of suffrage to women.'

"Respectfully submitted,

"W. L. POLING,

"Chairman Senate Committee,

"W. R. GODFREY,

"Chairman House Committee,

"Mr. Poling, from the Joint Committee on Passed Bills (otherwise known as the Joint Committee on Enrolled Bills), submitted the following report, which was received:

"Your Joint Committee on Passed Bills (otherwise known as the Joint Committee on Enrolled Bills), report that on the 11th day of March, 1920, they presented to His Excellency, the Governor, the following resolution:

115 "(H. J. R. No. 1)—'Ratifying the proposed amendment to the Constitution of the United States, extending the right of suffrage to women.'

"Respectfully submitted,

"W. L. POLING,

"Chairman Senate Committee,

"W. R. GODFREY,

"Chairman House Committee,

"On motion of Mr. Fox, the Senate *adjourned sine die.*"

Journal of House of Delegates.

(This journal shows the House duly met and organized in pursuance of the same proclamation and received the same message and communication from the Governor relating to the suffrage amendment as were received by the Senate.)

Wednesday, March 3, 1920.

"House Joint Resolution No. 1—'Ratifying the proposed amendment to the Constitution of the United States, extending the right of suffrage for women.'

"Whereas, The Sixty-sixth Congress of the United States of America, in Congress assembled, in both houses, by a constitutional majority of two-thirds of each house thereof, has made the following proposition to amend the Constitution of the United States of America in the following words, to wit:

"Joint resolution—'Proposing an amendment to the Constitution, extending the right of suffrage to women.'

"Resolved, By the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of each house concurring therein, that the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states.

146

"Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

"Congress shall have power to enforce this article by appropriate legislation. Therefore, be it

"Resolved, by the Legislature of West Virginia: That the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the legislature of the State of West Virginia.

"Resolved, That certified copies of the foregoing preamble and resolution of ratification be forwarded by the Governor of the State of West Virginia to the President of the United States, to the Secretary of State of the United States, to the President of the United States Senate and to the Speaker of the United States House of Representatives.

"Was made a special order,

"The Clerk reported the resolution.

"Pending the discussion of the resolution,

"Mr. John moved the previous question,

"The question prevailing, the Speaker propounded the main question, 'Shall the resolution (H. J. R. No. 1) be adopted?'

"On that question, the Clerk called the roll.

"On the adoption of the resolution,

"The ayes were:

"Messrs. Anderson, Blackhurst, Bland, Blizzard, Brand, Brammer, Byrnes, Cuppett, Ferguson, Fitch, Fotney (of Harrison), Fortney (of Preston), Grove, Hamilton, Hays, Hendricks, Hersman, Hil-
leary, Hobbs, John, Jones, Kern, Mahan, Mollohan, Morris, Moulds, Musser, McPherson, Neal (of Webster), O'Connor, Otto, Peck, Rankin, Scott, Spangler, Starcher, Stover, Sturm, Taylor, Thomas, Twyman, Vaughn, Weiss, Williams (of Ohio), Williams (of
147 Pleasants), Wysong and Wolfe (Speaker)—47.

"The noes were:

"Messrs. Bannister, Bray, Capehart, Clements, Coberly, Coleman, Coon, Godfrey, Hackney, Hale, Hall, Harvey, Hickman, Houvouras, Howard, Kuykendall, Lantz, Lester, Miller, Moore, Moran, McCau-
ley, McClaren, McClintic, McDermitt, McVey, Neale (of Cabell), Nutter, Parsons, Pedigo, Perin, Pettigrew, Pridemore, Richards, Rouss, Shomo, Summers, Swisher, Thurmond and Vanmeter—40.

"Absent and not voting:

"Messrs. Calhoun, Cosner, Cox, Cunningham, Sarver and Shaw—6.

"So, a majority of all the members present and voting having voted in the affirmative the resolution (H. J. R. No. 1) was adopted.

"Pending the calling of the roll, when his name was called, Mr. Neal (of Cabell), said:

"In 1916, West Virginia gave a majority vote of 98,067 votes against woman suffrage. I want to ask the members of this honorable body if they think it is the proper thing for us to do, to ignore the 98,067 majority cast against suffrage and grant the request of the ladies that stand before us here today.

"I am perfectly willing if it can be done to submit this question to the voters of West Virginia for ratification or rejection, but I am not willing to say that the 98,067 voters of the State of West Virginia, by their votes cast less than four years ago, have all been converted to woman suffrage.

"In the face of these facts, I don't believe a legislative grant will stand the test of the higher courts, and as I look this matter squarely in the face I see danger ahead. I can see the radical element in the next few years filling our Senate and Congress chambers at Wash-
ton; then and not until then will the American people realize just
148 what the Democratic and the Republican National Com-
tee- have done by endorsing and working for woman suffrage."

"Ordered, That Mr. John communicate to the Senate the adoption by the House of resolution (H. J. R. No. 1) and request concurrence therein.

"On motion of Mr. Wysong, the House adjourned until Thursday, March 4th, 1920, at 2 o'clock p. m."

Thursday, March 11, 1920.

"A message from the Senate, by

"Mr. Harmer, announced the concurrence of that body in the adoption of

"House Joint Resolution No. 1—'Ratifying the proposed amendment to the Constitution of the United States, extending the right of suffrage to women.'"

On motion of Mr. Hays, the House Delegates adjourned sine die.

It is agreed that any other part of said Journals of the Senate and House of Representatives of West Virginia may be read from the printed book at the argument.

The petitioners further offered the Rules of the Senate of West Virginia, of which, Rules 52, 68 and 69 are as follows:

"52. The question being once determined, must stand as the judgment of the Senate, and cannot during the session be drawn again into debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding business days.

"68. The Rules of Parliamentary Practice comprised in 'A Manual of General Parliamentary Law, with Suggestions for General Rules,' by Thos. B. Reed, shall govern the Senate in all cases not provided for by the rules of the Senate or in the Joint Rules of the Senate and House of Delegates. In any case not governed by the said Manual of said Rules, the Senate shall be governed by the practice in the Congress of the United States.

149 "69. No standing rule or order of the Senate shall be rescinded or changed without one day's notice being given of the motion therefor; and no rule shall be suspended except by a vote of two-thirds of all the members of the Senate present."

It is agreed that any other of said Senate Rules may be read from the printed rules at the argument. The petitioners further offered "Reed's Rules of Order," of which rules 183 and 184 are as follows:

Questions of Order.

"183. How Disposed Of.—Whenever the presiding officer or any member, calls attention to the fact that business is proceeding out of order, a correction can be made at once. If, however, the question of order be a disputed one, it is first decided by the presiding officer, subject to an appeal to the assembly.

"184. Manner of Raising and Deciding Points of Order.—Whenever any member thinks that the business of the assembly is going on contrary to proper order, he rises in his place and addresses the Chair, saying, 'Mr. Chairman: I rise to a point of order.' He is then asked to state his point of order, which he does. Thereupon either with or without debate, at the pleasure of the Chair, the presiding officer decides the question of order. If an appeal, which is debatable, be taken, then the question is put as follows: 'Shall the decision of the Chair stand as the judgment of the assembly?' If the point of order be overruled, then the business proceeds as before; if

sustained, then the order of action is changed to conform to the decision.

It is agreed that any other of said Rules may be read from the printed book at the argument.

The petitioners also offered in evidence over the objection of the Respondents certain decisions of the Supreme Court of Appeals of the State of West Virginia, to wit, decisions in the case of Osborne vs. Staley, 5th West Virginia 85, and Smith vs. Mitchell, 69 West Virginia 481, which it is agreed by counsel need not be printed in the record of this case, but may be read or referred to as contained
150 in the officially published West Virginia Reports.

"The petitioners also offered in evidence over the objection of the respondents certain decisions of the Supreme Court of the State of Tennessee, to wit, the decisions in the cases of

Brewer vs. Huntingdon, 86 Tenn. 732,

State vs. Algood, 87 Tenn. 163,

Webb vs. Carter, 129 Tenn. 182.

It is agreed that these decisions need not be printed in the record of this case, but may be read or referred to as contained in the officially published Tennessee Reports.

The petitioners further offered in evidence, over the objection of the Respondents certain correspondence between the Department of State of the United States and Miss Mary G. Kilbreth, President of the National Association Opposed to Woman Suffrage, and the Honorable Pat Harrison, United States Senator, as follows:

"National Association Opposed to Woman Suffrage.

"Headquarters,

"268 Madison Avenue, New York City.

"March 9, 1920.

"Hon. Frank L. Polk,

"Acting Secretary of State of the United States,

"Washington, D. C.

"DEAR SIR:

"In view of the fact that the U. S. Supreme Court will shortly render a decision on the pending case involving the legality of the Ohio Referendum we respectfully suggest that Ohio be not counted officially among the number of States which have ratified the Suffrage Amendment.

"We request that you inform the press that you will not count Ohio in the affirmative or issue any proclamation based thereon if to make up 36 it become necessary to count Ohio until after a decision by the Supreme Court in the Ohio case, nor will you
151 count any other State in the affirmative such as Oklahoma, New Mexico and Washington (in case the Legislatur of that

State ratifies if the time has not expired for legally invoking a referendum therein).

"We respectfully suggest that those like ourselves who believe in Home Rule are entitled to have the legislators in the States yet to vote know the real situation in regard to the referendum when they pass upon the question and we are confident you will treat us fairly in this matter and not attempt to foreclose a decision against us.

"Moreover, we call your attention to the fact that any proclamation not strictly legal might involve the Presidential election in a legal tangle and contest in view of which it would seem imperative that the Supreme Court should speak authoritatively in the pending case before any Executive decision is made.

"Please be kind enough to let me know whether or not you concur in the views I have set forth and especially if you take a different view of your official duty from that which I have suggested. Please do me the favor to advise me without delay so that we may be in a position to take such steps as may be necessary to have the question judicially determined.

"Respectfully yours,

"(Signed)

MARY G. KILBRETH,

"President,"

"Department of State,

"Washington,

"March 20, 1920,

"In reply refer to So 811,011/21.

"Miss Mary G. Kilbreth, President

"National Association Opposed to Woman Suffrage,

"726 14th Street, Washington, D. C.

"MADAM:

"This Department acknowledges the receipt of your letter of March 9, 1920, in which you request the Secretary of State
152 not to issue any proclamation declaring the Suffrage Amendment adopted if such proclamation is based upon the ratification by the States of Ohio, Oklahoma, New Mexico and Washington, until the Supreme Court of the United States shall have passed upon the legality of the Referendum provision of the Ohio State Constitution in the case of amendments to the National Constitution.

"Article V of the Constitution of the United States provides that amendments to that Constitution 'shall be valid to all intents and purposes, as parts of this Constitution, when ratified by the legislatures of three-fourths of the several states.'

"Section 205 of the Revised Statutes of the United States provides as follows:

"'Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to

be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.'

"You will have observed from the last quoted statute that whenever 'official notice' is received by this Department from the States that the amendment has been adopted 'the Secretary of State shall forthwith cause the amendment to be published.' The sufficiency of the action of any given State is not before this Department when an official notice from the proper authorities of the State has informed the Department that the amendment has been ratified by that particular state. Consequently, when a sufficient number of such notices have been received the Secretary of State is obliged 'forthwith' to publish the amendment.

"I am, Madam,

"Your obedient servant,

"(Signed)

ALVEY A. ADEE,

"Second Assistant Secretary."

153

"April 12, 1920.

"The Honorable Pat Harrison,

"United States Senate,

"Sir:

"I have the honor to acknowledge receipt of your letter of April 2, 1920, asking for copies of recent correspondence between the President of the Association Opposed to Woman Suffrage and this Department, relating to the proclamation of the nineteenth amendment.

"In reply to your request I enclose herewith copies of a letter from the President of the above Association, Miss Mary G. Kilbreth, dated March 20, 1920, and this Department's reply thereto of March 20, 1920.

"I have the honor to be, Sir,

"Your obedient servant,

"(Signed)

BAINBRIDGE COLBY.

"Enclosures:

From Miss Mary G. Kilbreth, March 20, 1920, and
Department's reply, March 20, 1920."

Evidence on Behalf of the Respondents.

The petitioners, having concluded their evidence, the respondents, to maintain the issues on their part, offered the following evidence.

The proclamation of the Secretary of State of the United States that the Nineteenth Amendment to the Constitution of the United States had been ratified by thirty-six states, being three-fourths of all the United States, and had become a part of the Constitution of the United States, as follows:

United States of America,

Department of State.

To all to whom these presents shall come, Greeting:

I Certify, That the document hereunto annexed is a true copy from the original in the archives of this Department.

(Secretary of State's Announcement that the Nineteenth Amendment has become valid as a part of the Constitution of the United States.—Signed August 26, 1920.)

In Testimony Whereof, I, Bainbridge Colby, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 26th day of November, 1920.

[SEAL.]

BAINBRIDGE COLBY,

Secretary of State,

By BEN G. DAVIS,

Chief Clerk.

Bainbridge Colby, Secretary of State of the United States of America, to all to whom these presents shall come, Greeting:

Know Ye, That the Congress of the United States at the first session, Sixty-sixth Congress begun at Washington on the nineteenth day of May in the year one thousand nine hundred and nineteen, passed a Resolution as follows: to wit—

Join Resolution.

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each
155 House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents, and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

And, further, that it appears from official documents on file in the Department of State that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, Bainbridge Colby, Secretary of State of the United States, by virtue and in pursuance of Section 295 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of August, in the year of our Lord one thousand nine hundred and twenty.

[SEAL]

BAINBRIDGE COLBY.

156 The Respondents then further offered in evidence a copy, bearing the certificate of the Secretary of State of the United States of America, of a resolution and a certificate thereto attached, which resolution and certificate relate to the said Nineteenth Amendment to the Constitution of the United States of America and which resolution and certificate were heretofore sent by the Executive of the State of West Virginia to the said Secretary of State of the United States of America and which resolution and certificate are as follows:

No. 3334.

United States of America,

Department of State.

To all to whom these presents shall come, Greeting:

I Certify, That the document hereto annexed is a true copy from the files and records of this Department.

Certified copy of the Joint Resolution of the Legislature of the State of West Virginia ratifying the Women Suffrage Amendment to the Constitution of the United States.

In Testimony Whereof, I Bainbridge Colby, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said De-

partment, at the City of Washington, this 13th day of December, 1920.

[SEAL.]

BAINBRIDGE COLBY,

Secretary of State,

By BEN G. DAVIS,

Chief Clerk.

Enrolled House Joint Resolution No. 1

(By Mr. John.)

Ratifying the Proposed Amendment to the Constitution of the United States Extending the Right of Suffrage to Women.

157 Whereas, the sixty-sixth congress of the United States of America, in congress assembled, in both houses, by a constitutional majority of two-thirds of each house thereof, has made the following proposition to amend the constitution of the United States of America in the following words, to-wit:

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in congress assembled (two-thirds of each house concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States,

"Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

Therefore, be it

Resolved, by the legislature of West Virginia: That the said proposed amendment to the constitution of the United States of America be and the same is hereby ratified by the legislature of the state of West Virginia.

Resolved, That certified copies of the foregoing preamble and resolution of ratification be forwarded by the governor of the state of West Virginia, to the president of the United States, to the secretary of state of the United States, to the president of the United

158 States senate and to the speaker of the United States house of representatives.

J. L. WOLFE,
Speaker of the House of Delegates.

C. L. TOPPING,
Clerk of the House of Delegates.

CHAS. H. SINSEL,
President of the Senate.

JOHN T. HARRIS,
Clerk of the Senate.

The within is approved this 13th day of March, 1920.

JNO. J. CORNWELL,
Governor.

Originated in the House. Takes effect — passage.

C. L. TOPPING,
Clerk of the House of Delegates.

C. L. TOPPING,
Clerk.

Correctly enrolled:

W. L. POLING,
Chairman Senate Committee.

W. R. GODFREY,
Chairman House Committee.

The Respondents then further offered in evidence a copy bearing the certificate of the Secretary of State of the United States of America, of a resolution and a certificate thereto attached, which resolution and certificate relate to the said Nineteenth Amendment to the Constitution of the United States of America and which resolution and certificate were heretofore sent by the Executive of the State of Tennessee to the said Secretary of State of the United States of America and which resolution and certificate are as follows:

159 No. 3336.

United States of America,
Department of State.

To all to whom these presents shall come, Greeting:

I Certify, That the document hereto annexed is a true copy from the files and records of this Department.

Certified copy of the Joint Resolution of the General Assembly of the State of Tennessee ratifying the Woman Suffrage Amendment to the Constitution of the United States.

In Testimony Whereof, I, Bainbridge Colby, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 13th day of December 1920.

[SEAL.]

BAINBRIDGE COLBY,

Secretary of State,

By BEN G. DAVIS,

Chief Clerk,

Executive Chamber, Capitol, Nashville,

State of Tennessee.

I, A. H. Roberts, by virtue of the authority vested in me as Governor of the State of Tennessee, and also the authority conferred upon me therein, do certify to the President of the United States, to the Secretary of State of the United States at Washington, District of Columbia, to the President of the Senate of the United States, and to the Speaker of the House of Representatives of the United States, that the attached paper is a true and perfect copy of Senate Joint Resolution Number 1, ratifying an amendment to the Constitution of the United States, declaring that the rights of the Citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex, and that the Congress shall have power to enforce said article by appropriate legislation, as set out in said resolution; and that same was passed and adopted by the first extra session of the Sixty-first General Assembly of the State of Tennessee, constitutionally called to meet and convened at the Capitol, in the city of Nashville, on August 9, 1920, thereby ratifying said proposed Nineteenth Amendment to the said Constitution of the United States of America, in manner and form appearing on the Journals of the two houses of the General Assembly of the State of Tennessee, true, full and correct transcript of all entries pertaining to which said Resolution Number 1, are attached hereto and made part hereof.

In Witness Whereof, I have hereunto signed my name as Governor of the State of Tennessee, and have affixed hereto the Great Seal of the State of Tennessee, at the Capitol, in the city of Nashville, Tennessee, on this the twenty-fourth day of August, 1920, at 10:17 A. M.

[SEAL.]

(Signed)

A. H. ROBERTS,

Governor of the State of Tennessee.

Senate Joint Resolution No. 1.

A Joint Resolution ratifying a proposed amendment to the Constitution of the United States, providing that the right of citizens of the United States to vote, shall not be denied or abridged by the United States or by any state on account of sex, and providing

further that Congress shall have power to enforce this article by appropriate legislation.

Whereas, both houses of the Sixty-sixth Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, passed a resolution submitting to the several states a proposition to amend the Constitution of the United States, a certified copy of which has been received by the Governor of the State of Tennessee, from the Secretary of State of the United States, as required by law, and by him transmitted to this General Assembly, the same being in the following words, to wit:

161 Sixty-sixth Congress of the United States of America;
At the first Session.

Begun and held at the City of Washington on Monday, the nineteenth day of May, One Thousand Nine Hundred and Nineteen.

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein). That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the Legislatures of three-fourths of the several states.

Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this Article by appropriate legislation."

F. H. GILLETTE,

Speaker of the House of Representatives.

THOMAS R. MARSHALL,

Vice President of the United

States and President of Senate.

Be it resolved by the Senate of the State of Tennessee, the House of Representatives concurring, that said proposed amendment to the Constitution of the United States of America, be and the same is, hereby ratified by the General Assembly of the State of Tennessee.

Be it further resolved, That certified copies of the foregoing preamble and joint resolution be forwarded by the Governor of the State of Tennessee to the President of the United States, to the Secretary of State of the United States at Washington, District of Columbia, to the President of the Senate of the United States, and to the Speaker of the House of Representatives of the United States.

162

I certify that the foregoing is a true copy of Senate Joint Resolution Number One, the original of which is now in my possession as Clerk of the Senate of the first extra session of the Sixty-first General Assembly of Tennessee.

W. M. CARTER,
Clerk of the Senate.

Transcript of the Senate Journal of the First Extra Session of the 61st General Assembly.

Senate Joint Resolution No. 1, Relative to Ratifying the Nineteenth Amendment to the Constitution of the United States.

Tuesday, August 10, 1920.

Second Day.

The Senate met at 10 o'clock A. M., pursuant to adjournment, and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by Senator Cannon.

On a call of the roll, all of the Senators responded to their names except Messrs. Candler, Coleman and Rice of Shelby.

On motion, the reading of the Journal was dispensed with. Mr. M. H. Copenhaver presented his certificate and was administered the official oath by Mr. Speaker Todd.

Introduction of Resolutions.

By Mr. Speaker Todd, Senate Joint Resolution No. 1, relative to ratifying the 19th Amendment to the Constitution of the United States.

Under the rule, the resolution lies over.

163

Wednesday, August 11, 1920.

Third Day.

The Senate met at 11 o'clock A. M., pursuant to adjournment, and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. Lin Cave.

On motion, the calling of the roll was dispensed with.

On motion, the reading of the Journal was dispensed with.

Mr. J. W. Murray, Senator-elect, presented his certificate, and was sworn in as Senator by Mr. Speaker Todd.

Resolutions Lying Over.

Senate Joint Resolution No. 1 relative to ratifying 19th Amendment.

Mr. Candler moved that the Resolution be referred to Committee on Judiciary.

Mr. Fuller raised the point of order that the question as to which committee the resolution should be referred to should be left entirely to the judgment of the Speaker. The Chair held that the point of order was not well taken, and that the motion to refer was in order.

Mr. Fuller moved that the motion to refer the Resolution to the Judiciary Committee be laid on the table and on the call of the roll the motion prevailed by the following vote:

Ayes.....	14
Noes.....	12

Senators voting "Aye" were: Messrs. Bradley, Burkhalter, Collins,openhaver, Dorris, Fuller, Gwin, Harber, Haston, Houk, McMahon, Matthews, Stockard and Wikle—14.

Senators voting "No" were: Messrs. Cameron, Candler, Coleman, Long, McFarland, Miller, Monroe, Murray, Parks, Rice of Stewart, Summers and Whitby—12.

64 The resolution was referred to the Committee on Constitutional Amendments.

Friday, August 13, 1920.

Fifth Day.

The Senate met at 10.30 A. M. o'clock, pursuant to adjournment, and was called to order by Mr. Speaker Todd. The proceedings were opened with prayer by the Chaplain, Rev. R. Lin Cave.

On call of the roll, all of the Senators responded to their names, except: Messrs. Caldwell, Clarke, Gwin, McFarland and Monroe.

On motion, the reading of the Journal was dispensed with.

Report of Standing Committees.

Constitutional Amendments.

Mr. Gwin presented the majority report signed by Messrs. Gwin,openhaver, Houk, Collins, Murray, Coleman, Wikle and Haston, on Senate Joint Resolution No. 1, as follows:

To the Speaker and Members of the Senate:

The Committee on Constitutional Amendments has carefully considered Senate Joint Resolution No. 1, and is of the opinion that the present Legislature has both a legal and moral right to ratify the proposed resolution.

Full power and jurisdiction of the question is conferred upon State Legislatures by the Fifth Article of the Federal Constitution. This power is not conferred upon some and withheld from others, but is granted to all, and any legislature may lawfully exercise the power thus expressly conferred. Therefore, the provision of the Constitution of Tennessee which undertakes to deny to the present

Legislature the right to exercise such power is clearly null and void because in direct conflict with the United States Constitution. The attempt to deny this Legislature this power is not only without legal force and effect, but is clearly not binding as a moral obligation. To contend that an illegal provision of a State Constitution imposes a duty or creates a moral obligation is to state a proposition that is manifestly and fundamentally wrong. The United States Constitution is the supreme law of the land and it is, therefore, no violation of his official oath for any legislator to disregard a State Constitutional inhibition that is in direct and irreconcilable conflict with the plain provision of the Federal Constitution. On the contrary, to be governed by a nugatory clause of the State Constitution on a purely Federal question,—and that is what the 19th Amendment is,—would be dangerously near the violation of the oath to support the Constitution of the United States. Legal opinions and common sense arguments could be multiplied in support of this position, but these are deemed unnecessary.

In view of the fact that all the members of the Senate are either Democrats or Republicans, and that both nominees and platforms of their respective parties, State and National, have unequivocally declared for the ratification of this Amendment, and that its final adoption is as certain as the recurrence of the seasons, and the further fact that this Senate has heretofore taken a stand in favor of woman suffrage by the enfranchisement as far as was legally possible of the womanhood of Tennessee, we have not considered it necessary to state the many good reasons that might be urged in favor of the adoption of the Amendment.

National Woman Suffrage by Federal amendment is at hand; it may be delayed, but it cannot be defeated, and we covet for Tennessee the signal honor of being the 36th and last State necessary to consummate this great reform.

Fully persuaded of its justice and confident of its passage, we earnestly recommend the adoption of the resolution.

Respectfully submitted,

(Signed)

L. E. GWIN,

Chairman.

M. H. COPENHAVER.

JOHN C. HOUK.

J. W. MURRAY.

T. L. COLEMAN.

DOUGLAS WIKLE.

E. N. HASTON.

166 Mr. Cameron presented the minority report of Messrs. Cameron and Rice of Stewart, as follows:

To the Speaker and Members of the Senate:

The undersigned members of the committee, make to your honorable body the following minority report and recommendations:

That the body refuse to act upon Senate Joint Resolution, we being of opinion that the present legislature has no right nor authority to act thereon at all, and that the same should be deferred to the succeeding legislature.

We, therefore, dissent from the recommendation of the majority and recommend in lieu, that no action upon the subject be taken at this special session.

Respectfully submitted,

(Signed)

J. W. RICE.

W. M. CAMERON.

Mr. Cameron made a motion to adopt the minority report.

Mr. Haston made a motion to table the motion to adopt the minority report.

On a call of the roll, the result on the motion to table was as follows:

Ayes.....	23
Noes.....	10

Senators voting "Aye" were: Messrs. Bradley, Burkhalter, Caldwell, Carter, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Haston, Hill, Houck, McMahon, Matthews, Monroe, Murray, Patton, Rice of Shelby, Stockard, Wikle and Mr. Speaker Todd—23.

Senators voting "No" were: Messrs. Cameron, Candler, Clarke, Long, McFarland, Miller, Parks, Rice of Stewart, Summers and Whitby—10.

Mr. Haston made a motion to adopt the majority report. The motion prevailed.

167

Resolutions Lying Over.

Senate Joint Resolution No. 1 relative to ratifying proposed 19th amendment to the United States Constitution. Mr. Haston made a motion to adopt the resolution. Mr. McFarland made the point of order in writing, as follows:

Mr. Speaker: I make the point of order that the Senate has no right or authority to act upon the proposed amendment to the Federal Constitution, under the Constitution of the State of Tennessee, Article No. 2, Section 32.

McFARLAND.

The Speaker's ruling on the above point of order is as follows:

On the point of order made by the Senator from Wilson, the Speaker rules that it is not in the province of the speaker to determine or pass upon the authority or power of the Senate to act under the Constitution to consider this proposed amendment, but that this is a question for the body to determine.

Point of order overruled.

Mr. McFarland appealed from the ruling of the chair.

Mr. Speaker Todd called Mr. Hill to the chair, who put the question to the Senate as follows: Shall the ruling of the Chair be sustained?

Mr. Gwin made the following point of order: That discussion must be confined to the appeal from the ruling of the Chair and that it was not in order to discuss the constitutionality of the resolution.

The Chair ruled that the point of order was well taken.

On the call of the roll the chair was sustained by the following vote:

Ayes	27
Noes	5

Senators voting "Aye" were: Messrs. Bradley, Burkhalter, Caldwell, Cameron, Carter, Clarke, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Haston, Hill, Houk, Long, McMahon, 168 Matthews, Miller, Monroe, Murray, Parks, Patton, Rice of Shelby, Stockard and Wikle—27.

Senators voting "No" were: Messrs. Candler, McFarland, Rice of Stewart, Summers and Whitby—5.

Mr. Haston renewed his motion on the adoption of the resolution. The motion prevailed.

On call of the roll, the resolution was adopted by the following vote:

Ayes	25
Noes	4
Present not voting.....	2

Senators voting "Aye" were: Messrs. Bradley, Burkhalter, Caldwell, Carter, Coleman, Collins, Copenhaver, Dorris, Fuller, Gwin, Harber, Haston, Hill, Houk, Long, McMahon, Matthews, Monroe, Murray, Patton, Rice of Shelby, Stockard, Whitby, Wikle and Mr. Speaker Todd—25.

Senators voting "No" were: Messrs. Candler, Parks, Rice of Stewart, and Summers—4.

Senators present and not voting were: Messrs. McFarland and Miller—2.

A motion to reconsider was laid on the table.

Explanations.

Mr. Speaker: I refuse to vote on the proposed Federal Amendment from the fact that I am not inclined to perjure myself by violating what I consider my solemn oath.

(Signed)

LON P. MCFARLAND.

Explanation of Mr. Dorris follows:

Explanation of Mr. Dorris of his vote on Senate Joint Resolution No. 1 on the ratification of the Woman Suffrage Amendment to the Federal Constitution.

169 Several months ago when it became apparent that the Legislature would be called together in extra session to act upon some vital matters, it also became apparent that the 19th Amendment to the Federal Constitution, giving women the right of suffrage, would be included.

Being in favor of woman suffrage, I set about the task of working out for myself the question as to whether I would be violating my oath to the State if I voted for the amendment at this time. In trying to arrive at a conclusion, I finally worked out the solution in my own mind, basing my opinion on this construction:

"The Constitution of the United States when adopted and ratified by the States was complete within itself, and no other instrument of any kind not adopted by the same power or ratified by the states could in any way modify or control it."

The United States Supreme Court in deciding the recent case of Hawkes vs. Smith, among other things, said:

"It is true that the power to legislate in the enactment of the laws of the state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented."

It is held by many that the present legislature could not legally ratify the amendment without violating their oath to the Constitution of Tennessee. The Constitution of Tennessee, Sec. 32, Art. II, specifically states:

"No Convention or General Assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such Convention or General Assembly shall have been elected after such amendment is submitted."

When we follow the Constitution of Tennessee, there is only one construction that can be placed upon this point, and that is that

170 it was clearly in the minds of the framers of the Constitution of 1870 that all amendments to the Federal Constitution

hereafter submitted should be ratified by the vote of the people, either by election to the General Assembly or by a convention which is equivalent to a referendum by the people. This the Supreme Court of the United States clearly set out in the Hawkes vs. Smith decision could not be done. On this point the Court said:

"The Constitution of Ohio, in its present form, although making provision for a referendum, vests the legislative power primarily in

a General Assembly consisting of a Senate and House of Representatives. Article II, Section 1, provides:

'The legislative power of the State shall be vested in a general assembly consisting of a Senate and House of Representatives, but the people shall reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.'

The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the federal constitution through the medium of a referendum rests upon the proposition that the federal constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of the amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."

Therefore, when Sec. 32, Article II, was written into the Constitution of Tennessee, the framers wrote a clause that was null, void, and non-existent.

And with this view of the question, I have been able to reach the conclusion that I would not be violating my oath to the State when I cast my vote to ratify the amendment, and I therefore vote "Aye."

FINLEY M. DORRIS.

171

Monday, August 16, 1920.

Eighth Day.

The Senate met at 2 o'clock P. M., pursuant to adjournment, and was called to order by Mr. Speaker Todd.

The proceedings were opened with prayer by the Chaplain, Rev. R. Lin Cave.

On a call of the roll, all of the Senators responded to their names, except Messrs. Bradley, Fuller and Long.

Mr. McFarland reported that Mr. Bradley was absent on account of illness.

On motion, the reading of the Journal was dispensed with.

Enrolled Bills.

Committee on Enrolled Bills.

Mr. Speaker: Your Committee on Enrolled Bills beg leave to report that we have carefully examined Senate Joint Resolution No. 1, and find same correctly engrossed and ready for transmission to the House.

SUMMERS,
Chairman.

Monday, August 16, 1920.

Eighth Day.

The House met at 2 P. M. and was called to order by Mr. Speaker Walker.

Proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 98 members were found to be present.

The absent member was Mr. Harris of Wilson.

On motion the reading of the Journal was dispensed with.

172

Message from the Senate.

Mr. Speaker: I am directed to transmit to the House, Senate Joint Resolution for signature of the Speaker of the House, also Senate Joint Resolution No. 1, relative to the 19th Amendment to the Constitution.

Tuesday, August 17, 1920.

Ninth Day.

The House met at 10:30 A. M. and was called to order by Mr. Speaker Walker.

Proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 96 members were found to be present.

The absent members were Messrs. Brooks and Rowan, who were excused, and Mr. Harris of Wilson.

On motion, the reading of the Journal was dispensed with.

Resolutions Lying Over.

Senate Joint Resolution No. 1, relative to ratifying the 19th Amendment.

Pending consideration, Mr. Overton presiding, Mr. Walker moved to adjourn until 10 A. M. tomorrow.

The motion prevailed by the following vote:

Ayes	52
Noes	44

Representatives voting Aye were: Messrs. Bond, Boyd, Boyer, Bratton, Burns, Carter, Carr, Cassady, Check, Cole, Crawford, of Fayette, Dunlap, Francisco, Frogge, Gilbreath, Hall, Harvill, Hays, Hickman, Jackson, Keisling, Leath, Long, Martin of Hamilton, McCalmann, McMurray, Millican, Montgomery, Moore, Norville, Oldham, Overton, Phelan, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Travis of Franklin, Turner, Vinson, Weldon, L. M. Whittaker, M. E. Whittaker, Whitfield, Wilson, Wonfenbarger, Womack and Mr. Speaker Walker—52.

Representatives voting No were: Messrs. Anderson, Bell, Brooks, Canale, Crawford of Bedford, Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Forsythe, Griffin, Hanover, Harris, of Knox, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Light, Longhurst, Luther, Lynn, Martin, of Washington, Miller, Morgan, Moose, Odle, Phillips, of Hawkins, and Phillips, of Madison, Rector, Riddick, Shoaf, Simpson, of Bradley, Simpson, of Humphreys, Stovall, Swink, Tarrant, Thronesbury, Travis, of Henry, Tucker and Wade—44.

Wednesday, August 18th, 1920.

Tenth Day.

The House met at 10 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 96 members were found to be present.

The absent members were: Messrs. Brooks, and Rowan, who were excused, and Harris, of Wilson.

On motion the reading of the Journal was dispensed with.

Unfinished Business.

Senate Joint Resolution No. 1, relative to ratification of the 19th Amendment.

Mr. Walker, Mr. Overton presiding, moved that the resolution be tabled.

The motion failed for the want of majority by the following vote:

Ayes	48
Noes	48

174 Representatives voting Aye were: Messrs. Bond, Boyer, Boyd, Bratton, Burn, Carter, Cassady, Check, Cole, Crawford, of Fayette, Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harvill, Hayes, Jackson, Keisling, Long, Martin, of Hamilton, Mc Murray, Millican, Montgomery, Moore, Norville, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Thronesbury, Travis, of Franklin, Vinson, Weldon, L. M. Whittaker, M. E. Whittaker, Whitfield, Wilson, Wolfenbarger, Womack, and Speaker Walker—48.

Representatives voting No were: Messrs. Anderson, Bell, Canale, Carr, Crawford, of Bedford, Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris of Knox, Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin, of Washington, McCalman, Miller, Morgan, Moose, Odle, Phelan, Phillips, of Hawkins, and Phillips, of Madison, Rector, Riddick, Shoaf, Simpson, of Bradley, Simpson, of Humphreys, Stovall, Swink, Tarrant, Travis, of Henry, Tucker, Turner and Wade—48.

Thereupon the resolution was concurred in, and adapted by the following vote:

Ayes	50
Noes	46

Representatives voting Aye were: Messrs. Anderson, Bell, Burn, Canale, Carr, Crawford, of Bedford, Davis, Dodson, Dowlin, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris, of Knox, Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leith, Light, Longhurst, Luther, Lynn, Martin, of Washington, McCallman, Miller, Morgan, Moose, Odle, Phelan, Phillips, of Hawkins, Phillips, of Madison, Rector, Riddick, Shoaf, Simpson, of Bradley, Simpson, of Humphrey, Stovall, Swink, Tarrant, Travis, of Henry, Tucker, Turner, Wade, Mr. Speaker Walker—50.

Representatives voting No were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Cheek, Cole, Crawford, of Fayette, Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harvell, Hayes, Jackson, Keisling, Long, Martin, of Hamilton, McMurray, Millican, Montgomery, Moore, Norvill, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Thronsberry, Travis, of Franklin, Vincent, Weldon, L. M. Whittaker, M. E. Whitaker, Whittfield, Wilson, Wolfenbarger, and Womack—46.

Explanations.

Messrs. Cassady and Hall offered explanations which were spread charge upon the Journal.

Mr. Walker (Mr. Overton presiding), changed his vote from No to Aye, and entered a motion on the Journal to reconsider.

Saturday, August 21, 1920.

Thirteenth Day.

The House met at 10 a. m. Was called to order by Mr. Speaker Walker. The proceedings were opened with prayer by the Chaplain, Rev. R. B. Cawthon.

Mr. Riddick moved that the call of the roll be dispensed with. The motion prevailed.

Mr. Montgomery made the point of order that no quorum was present, and demanded roll call.

On a call of the roll the following members were found to be present:—Messrs. Anderson, Bell, Bond, Boyer, Brooks, Burns, Canale, Carr, Cassady, Crawford, of Bedford, Davis, Dodson, Dowlin, Ellis, Fisher, Fitzhugh, Forsythe, Foster, Frogge, Griffin, Hanover, Harris, of Knox, Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leith, Light, Longhurst, Luther, Lynn, Martin, of Washington, Martin, of Hamilton, McCallman, Miller, Montgomery, Morgan, Moose, Odle, Phelan, Phillips, of Hawkins, Phillips, of Madison, Rector, Riddick, Shoaf, Simpson, of Bradley, Simpson, of Hum-

phreys, Stovall, Swink, Tarrant, Thronesberry, Travis, of Henry, Tucker, Turner, Wade, and Mr. Speaker Walker—59.

Mr. Odle moved that the Speaker prepare a list of the absentees and give same to the Sergeant-at-Arms, with the request that he go out and arrest any and all absent members and bring them into the house.

176 Before the motion was put, Mr. Speaker Walker announced that under the rules of the house, such action on his part was necessary, and instructed the Sergeant-at-Arms to secure a list of the absent members, and if possible, bring the members to the House.

On motion of Mr. Riddick, at 10:30 a. m., the House recessed for one hour. At the expiration of the recess, the House was called to order by Mr. Speaker Walker.

Mr. Riddick offered the following written motion.

Mr. Speaker, I call from the Journal the motion to reconsider Senate Joint Resolution No. 1.

Mr. Speaker Walker ruled the motion out of order, for the following reasons:

1. Because the roll call shows no quorum present. Section 2 of Article 2 of the Constitution of the State provides, in part: "Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business, but a small number may adjourn from day to day, and may be authorized by law, to compel the attendance of absent members."

2. Because the Attorney-General of the State has held that it was only necessary for a majority of the members present constituting a quorum to ratify the 19th Amendment. If it requires a quorum to pass on the question of ratification, certain it is that a quorum must be present to reconsider.

3. STATE OF TENNESSEE:

To A. H. Roberts, Governor of the State of Tennessee; Ike B. Stevens, Secretary of the State of Tennessee; A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee; Seth Walker, Speaker of the House of Representatives of the State of Tennessee, and their counsellors, attorneys, solicitors and agents, and each and every one of them, Greetings:

Whereas, in a certain suit instituted in Part 2, of our Court of Chancery at Nashville, by C. Runcie Clements, Rufus E. Fort, Edward Buford, Dudley Gale, Jas. A. Yowell, A. S. Warren and George

177 Washington, complainants against A. H. Roberts, Ike B. Stevens, A. L. Todd and Seth Walker, defendants, the complainants having obtained from Honorable F. C. Langford, Judge, a fiat for a writ of injunction to issue to enjoin defendants A. H. Roberts Governor of the State of Tennessee, Ike B. Stevens, Secretary of State; A. L. Todd, Speaker of the Senate of the General Assembly of the State of Tennessee; Seth Walker, Speaker of the House of Representatives of the General Assembly of the State of Tennessee, and each of them, from making, signing, or issuing any proclama-

tion, declaration, resolution, or certificate, declaring that the State of Tennessee has constitutionally and legally adopted the proposed 19th Amendment to the Constitution of the United States, and from further taking any official action with reference to the illegal action of the Special Session of the General Assembly of the State of Tennessee, purporting to ratify and adopt said 19th Amendment to the Constitution of the United States; and

The complainants having executed the bond required by the said fiat. We, Therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said A. H. Roberts, Ike B. Stevens, A. L. Todd and Seth Walker, in their official capacities—set forth above, and all and every person before mentioned under the penalty prescribed by law of your and every of your goods, lands, tenements, to be levied to our use that you and every one of you do absolutely desist from doing any of the things above forbidden, restrain and enjoin—until hearing of this cause in our said Courts of Chancery.

Witness, Joseph R. West, Clerk and Master, of our said Court, at office the first Monday in April in the year of our Lord, 1920, and in the 144th year of our Independence.

(Signed)

JOSEPH R. WEST,

Clerk and Master,

By C. H. SWAN,

Deputy Clerk and Master.

178 Mr. Riddick appealed from the decision of the chair.

The Chair (Mr. Odle presiding) stated that the question was whether or not the chair should be sustained in its ruling.

On a call of the roll, the House refused to sustain the decision of the chair by the following vote:

Ayes	8
Noes	49
Present and not voting	1

Representatives voting Aye were: Messrs. Bond, Boyer, Cassady, Forsythe, Frogge, Martin of Hamilton, Montgomery and Thronesberry—8.

Representatives voting No were: Messrs. Anderson, Bell, Brooks, Burns, Canale, Carr, Crawford of Bedford, Davis, Dodson, Dowlin, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris of Knox, Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn, Martin of Washington, McCallman, Miller, Morgan, Moose, Odle, Phelan, Phillips of Hawkins, Phillips of Madison, Rector, Riddick, Shoaf, Simpson of Bradley, Simpson of Humphreys, Stovall, Swink, Tarrant, Travis of Henry, Tucker and Wade—49.

The Representative present and not voting was Mr. Speaker Walker.

Mr. Riddick offered the following written motion:

Mr. Speaker: I move you that the House now reconsider its action in concurring in the adoption of Senate Joint Resolution No. 1.

Mr. Walker (Mr. Odle presiding) made the point of order that no quorum was present and demanded a roll call.

The chair (Mr. Odle presiding) stated that he would first have a roll call on Mr. Riddick's motion and after that was disposed of would order a roll call on the demand of Mr. Walker that a quorum was not present.

Mr. Walker again demanded a roll call on the point of order that no quorum was present.

179 The Chair (Mr. Odle presiding) stated that there was a motion before the House and that a roll call on Mr. Walker's demand that no quorum was present would be ordered immediately after the motion of Mr. Riddick was disposed of.

Thereupon the motion of Mr. Riddick that the House reconsider its action in concurring in and adopting Senate Joint Resolution No. 1, failed by the following vote:

Ayes	9
Noes	50
Present and not voting.....	9

Representatives voting were: Messrs. Anderson, Bell, Brooks, Burns, Canale, Crawford of Bedford, Davis, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris of Knox, Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Longhurst, Luther, Lynn of Washington, McAlunan, Miller, Morgan, Moose, Odle, Pheland, Phillips of Hawkins, Phillips of Madison, Rector, Riddick, Shoaf, Simpson of Bradley, Simpson of Humphrey, Stovall, Swink, Tarrant, Travis of Henry, Tucker, Turner and Wade—50.

Representatives present and not voting were: Messrs. Bond, Boyer, Cassady, Forsythe, Frogge, Martin of Hamilton, Montgomery, Thronberry and Mr. Speaker Walker—9.

Mr. Walker (Mr. Odle presiding) made the point of order that Mr. Odle was only acting as Speaker by his request and was therefore enjoined from putting any motion before the house.

Mr. Riddick offered the following written motion:

Mr. Speaker: I move you that the Clerk of this House be, and he is hereby instructed to transmit to the Senate through the ordinary procedure Senate Joint Resolution No. 1.

On a vive voce vote the Chair (Mr. Odle presiding) declared the motion carried.

On motion of Mr. Riddick, the House adjourned until 3 P. M. Monday.

180 Mr. Speaker: I am directed to return to the Senate—Senate Joint Resolution No. 1, relative to ratifying the 19th Federal Amendment:

By the following written motion:

Mr. Speaker: I move you that the Clerk of the House be, and he is hereby instructed to transmit to the Senate through the ordinary procedure Senate Joint Resolution No. 1.

The Respondents then further offered in evidence a copy bearing the certificate of the Secretary of State of the United States of

America, of a resolution and a certificate thereto attached, which resolution and certificate relate to the said Nineteenth Amendment to the Constitution of the United States of America and which resolution and certificate were heretofore sent by the Executive of the State of Connecticut to the said Secretary of State of the United States of America and which resolution and certificate are as follows:

No. 3335.

United States of America,
Department of State.

To all to whom these presents shall come, Greeting:

I certify, That the document hereto annexed is a true copy from the files and records of this Department.

Certified copy of the Joint Resolution of the General Assembly of the State of Connecticut ratifying the Woman Suffrage Amendment to the Constitution of the United States.

In testimony whereof, I, Bainbridge Colby, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 13th day of December, 1920.

[SEAL.]

BAINBRIDGE COLBY,

Secretary of State,

By BEN G. DAVIS,

Chief Clerk.

181 STATE OF CONNECTICUT,
Office of the Secretary, ss:

I, Frederick L. Perry, Secretary of the State of Connecticut, and keeper of the seal thereof, and of the original record of the Acts and Resolutions of the General Assembly of said State, Do Hereby Certify that I have compared the annexed copy of the concurrent resolution ratifying the proposed amendment to the Constitution of the United States on woman suffrage with the original record of the same now remaining in this office, and have found the said copy to be a correct and complete transcript thereof.

And I Further Certify, That the said original record is a public record of the said State of Connecticut, now remaining in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said State, at Hartford, this 14th day of Sept., 1920.

[SEAL.]

FREDERICK L. PERRY,

Secretary,

State of Connecticut,

General Assembly,

Special Session, Sept. 14th, 1920.

*Concurrent Resolution Ratifying the Proposed Amendment to the
Constitution of the United States on Woman Suffrage.*

Whereas, The Sixty-sixth Congress of the United States of America, in both Houses by a constitutional majority of two-thirds thereof has made the following proposition to amend the Constitution of the United States, in the following words, to wit:

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right
of Suffrage to Women.

Resolved, by the Senate and House of Representatives of
182 the United States of America, in Congress assembled, two-
thirds of each house concurring therein, that the following
article is proposed as an Amendment to the Constitution, which shall
be valid to all intents and purposes as part of the Constitution when
ratified by the Legislatures of three-fourths of the several states.

Article XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Therefore be it

Resolved, by the General Assembly of the State of Connecticut that the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the General Assembly of the State of Connecticut.

Resolved, that certified copies of the foregoing preamble and resolution be forwarded by the Governor of the State of Connecticut to the President of the United States, the Secretary of State of the United States, the President of the Senate of the United States and the Speaker of the House of Representatives of the United States.

House of Representatives, Passed September 14, 1920.

Senate, Passed September 14, 1920.

CLIFFORD B. WILSON,

President of the Senate,

JAS. F. WALSH,

Speaker of the House.

Certified as correct by

FREDERICK L. PERRY,

Secretary.

183 *Testimony on Behalf of Petitioners in Rebuttal.*

The respondents having concluded their evidence, the petitioners in rebuttal offered the following evidence, over the objection of the respondents as to its relevancy, to wit:

A copy of the proceedings in the Legislature of Tennessee as filed with and certified by the Secretary of State of the United States of America subsequent to the proceedings mentioned in the certificate relating to the actions of the General Assembly of Tennessee offered on behalf of the respondents, as follows:

No. 3381.

United States of America,

Department of State.

To all to whom these presents shall come, Greeting:

I Certify, That the document hereto annexed — a true copy from the files and records of this Department.

Certified copy of the House Journal of the Sixty-first General Assembly of the State of Tennessee, in Extraordinary Session assembled, with reference to each and every proceeding had on Senate Joint Resolution No. 1—Relative to ratifying the 19th Amendment, on August 31st, 1920, and each and every proceeding had thereafter.

In Testimony Whereof, I, Bainbridge Colby, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 16th day of December, 1920.

[SEAL.]

BAINBRIDGE COLBY,

Secretary of State,

By BEN G. DAVIS,

Chief Clerk.

184

Sept. 7, 1920.

Secretary of State:

I, A. H. Roberts, Governor of the State of Tennessee, at the request of the House of Representatives of said State, do hereby certify that the attached paper is a full true, and correct copy or transcript of all entries appearing on the Journal of the House of Representatives of the State of Tennessee, on the respective dates specified therein, relative to the action of the said House of Representatives upon Senate Joint Resolution Number 1, pertaining to the Nineteenth Amendment to the Constitution of the United States, at the extraordinary session of the Sixty-first General Assembly of the State of Tennessee, constitutionally called and convened at the Capitol at

Nashville, on August 9, 1920; and I do further certify that John Green is the Clerk of the House of Representatives, and that as such, he is the custodian of the Journal of said House of Representatives, and under the Constitution and laws of Tennessee, has authority to make copies of said Journal, and to certify to the correctness of the same, and that his signature thereto is genuine.

In Witness Whereof, I have hereunto signed my name as Governor of the State of Tennessee, and have affixed hereto the Great Seal of the State of Tennessee, at the Capitol, in the City of Nashville, on this the 3rd day of September, 1920.

[SEAL.]

A. H. ROBERTS,
Governor of the State of Tennessee.

Tuesday, August 31, 1920.

Twenty-third Day.

The House met at 10.30 A. M. and in the absence of Mr. Speaker Walker, was called to order by Chief Clerk Green.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 48 members were found to be present, 185

The absent members were: Messrs. Bell, Boyd, Boyer, Bratton, Canale, Carter, Cassady, Cheek, Cole, Crawford (of Fayette), Davis, Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harris (of Wilson), Harville, Hays, Howard, Jackson, Keisling, Long, Luther, Martin (of Washington), McCalman, McMurray, Miller, Millican, Moore, Norvell, Oldham, Rowan, Rucker, Shappe, Sipes, Skidmore, Smith, Story, Swift, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—51.

On motion of Mr. Kenton the House stood at ease until 2 P. M. today.

At the hour of 2 P. M. the House was called to order by Mr. Speaker Walker.

On a call of the roll 91 members were found to be present.

The absent members were: Messrs. Canale, Davis, Harris (of Wilson), Luther, Martin (of Washington), Miller, Rowan, and Sipes.

On motion the reading of the Journal was dispensed with.

Mr. Hall offered the following written motion:

Mr. Speaker: I move that each and every motion and proceeding appearing on pages 237-238-239-240-241-242 of the Journal of the Lower House of Tennessee of the 61st General Assembly in extraordinary session assembled has on August 21st, 1920, save and except the roll call showing no quorum to be present and the points of order made and the rulings thereon be expunged from the Journal.

Mr. Riddick made the following point of order:

Mr. Speaker: I rise to a parliamentary inquiry and ask: Is a motion in order which proposes to reconsider Senate Joint Resolution

Number 1, which was concurred in and adopted by the House of Representatives on Wednesday, August 18th, 1920, by a vote of 50 for and 46 against. I make the point of order that the action of this House in concurring in and adopting said resolution cannot now be reconsidered, because:

1. By the concurrence in and adoption of said Joint Resolution the proposed amendment to the Constitution of the United States therein embodied, was ratified by the State of Tennessee and the power and authority of this House over said resolution was ipso facto terminated.

2. The legislature of Tennessee derives its power to act upon a proposed amendment to the Constitution of the United States from that Constitution, Article V thereof, and from that only. So when a legislature of a State ratified a proposed amendment to said Constitution, its action is final and this power so given by the Constitution of the United States cannot be restricted, modified, or enlarged, and no legislature can, nor can this House of Representatives, provide any rule of procedure, or rule of action which will or can in any manner rescind, reconsider or affect the action of the legislature after a proposed constitutional amendment has been ratified.

3. In acting upon, concurring in and adopting said resolution this legislature was engaged not in a legislative act but was performing a political act and duty for the State of Tennessee, and the rules of this House cannot be applied to, or in any manner govern or control the action of this body in acting upon a proposed amendment to the Constitution of the United States.

4. Rule 31 under which it is sought to maintain or bring forward the proposed motion to reconsider is applicable to questions of legislation only and not political questions and this appears from the rule itself. This body is without power to make a rule which can affect or control in any way the action of this House in acting upon a proposed amendment to the Constitution of the United States.

5. This House of Representatives by the concurrence in and adoption of said joint resolution ratified said proposed amendment to the Constitution of the United States for the State of Tennessee and this body is without power or authority to rescind, reconsider, or repudiate the affirmative action it has taken.

6. This House has already on Saturday, August 21, 1920, by a vote of 50 to nothing, refused to reconsider its action concurring in Senate Joint Resolution No. 1, and directed that said Resolution be returned to the Clerk of the Senate which was accordingly done. Having parted with the possessions of said Resolution, the same is now beyond its control, and no action the House could take, would affect it in any way whatsoever.

7. In adopting the motion to concur in Senate Joint Resolution No. 1, this House was not legislating, but helping to cast the vote of

Tennessee on the 19th Federal Amendment giving suffrage to women and that vote having now been cast, counted, and the result announced, Tennessee can vote no more.

Mr. Speaker Walker overruled the points of order, stating that at present they were premature.

Mr. Odle made the following points of order:

Mr. Odle: I make the point of order that this House cannot *now* reconsider Senate Joint Resolution No. 1, ratifying the Nineteenth Amendment to the Constitution of the United States—because

1. Said Joint Resolution is not in the actual possession of this House, and the Clerk of the House cannot produce it for any action thereon.

2. Under Rule 31—the resolution passed to the Senate when the time in which it could be reconsidered had elapsed.

3. The House by a vote of fifty members declined to reconsider said resolution and directed the Clerk of this House to transmit it as concurred in, to the Senate.

4. Said Joint Resolution is not the exercise of a legislative but of a political function and when passed cannot be reconsidered.

Mr. Speaker Walker overruled the points of order stating that at present they were premature.

188 Thereupon the motion of Mr. Hall prevailed by the following vote:

Ayes	47
Noes	37
Present not voting	6

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Check, Cole, Crawford (of Bedford), Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hays, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Skidmore, Smith, Story, Swift, Throneberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—47.

Representatives voting no were: Messrs. Brooks, Burn, Carr, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Hickman, Jeter, Keaton, Larsen, Leath, Light, Loughurst, Lynn, McCalman, Morgan, Moose, Odle, Phelan, Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Bradley), Simpson (of Humphreys), Stoval, Swink, Tarrant, Travis (of Henry), Tucker and Wade—37.

Representatives present and not voting were: Messrs. Anderson, Bell, Harris (of Knox), Johnson, Kahn, Phillips (of Hawkins)—6.

Explanations.

My reason for answering present and not voting is—that we may get rid of this question and get down to business and finish up some needed legislation which cannot be done while this question is still in the shape it is. I am satisfied the amendment has been passed and settled and further action by this body will avail nothing.

JOE HARRIS.

Explanation of present and not voting—Ernest S. Bell:

Mr. Speaker, I am not voting for the reason that I believe the matter is beyond the jurisdiction of this body. The Secretary of State has issued his proclamation declaring that Tennessee has ratified the 19th Amendment; that it is now a part of the Federal Constitution and is the supreme law of the land. Therefore, I do not believe that this body has a right to act further on the matter. For that reason I refuse to vote or participate in further action.

ERNEST S. BELL.

Mr. Hall moved that Senate Joint Resolution No. 1 be supplied and that the supplied copy be spread upon the Journal.

The motion prevailed and the resolution is as follows:

Senate Joint Resolution No. 1.

"A Joint Resolution ratifying a proposed Amendment to the Constitution of the United States, providing that the right of citizens of the United States to vote, shall not be denied or abridged by the United States or by any State on account of sex, and providing further that Congress shall have power to enforce this article by appropriate legislation.

"Whereas, Both Houses of the Sixty-sixth Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, passed a resolution submitting to the several States a proposition to amend the Constitution of the United States, a certified copy of which has been received by the Governor of the State of Tennessee, from the Secretary of State of the United States, as required by law, and by him transmitted to the General Assembly, the same being in the following words, to-wit:

"Sixty-sixth Congress of the United States of America.

At the First Session

Begun and Held at the City of Washington on Monday, the Nineteenth Day of May, One Thousand Nine Hundred and Nineteen.

Joint Resolution

Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women.

190 Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following Article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

Article —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this Article by appropriate legislation."

F. H. GILLETTE,

Speaker of the House of Representatives,

THOS. R. MARSHALL,

Vice-President of the United States

and President of Senate.

"Be it resolved by the Senate of the State of Tennessee, the House of Representatives concurring, that said proposed amendment to the Constitution of the United States of America, be and the same is, hereby ratified by the General Assembly of the State of Tennessee.

"Be it further resolved, that certified copies of the foregoing preamble and joint resolution be forwarded by the Governor of the State of Tennessee to the President of the United States, to the Secretary of State of the United States at Washington, District of Columbia, to the President of the Senate of the United States, and the Speaker of the House of Representatives of the United States."

Mr. Hall called up the motion to reconsider Senate Joint Resolution No. 1.

Mr. Riddick renewed his point of order made.

Mr. Speaker Walker overruled points of order.

Mr. Odle made the following point of order:

191 That the proposed supply of copy of Senate Joint Resolution No. 1 does not show that it is a true and perfect copy of said Resolution and is not certified to.

2. That a resolution cannot be supplied and acted upon, but the original must be in actual possession of the House or no action can be taken.

Mr. Speaker Walker overruled the point of order.

Thereupon Mr. Hall's motion prevailed.

Mr. Hall moved that the House reconsider its action in concurring in Senate Joint Resolution No. 1.

The motion prevailed.

Mr. Hall moved that the House non-concur in Senate Joint Resolution No. 1.

Motion prevailed and the House non-concurred in Senate Joint Resolution No. 1 by the following vote:

Ayes	47
Noes	24
Present and not voting	20

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Cassady, Cheek, Cole, Crawford (of Bedford), Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hays, Jackson, Keisling, Long, Martin (of Hamilton), McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Skidmore, Smith, Story, Swift, Thorneberry, Travis (of Franklin), Vinson, Weldon, L. M. Whitaker, M. E. Whitaker, Whitfield, Wilson, Wolfenbarger, Womack and Mr. Speaker Walker—47.

Representatives voting no were: Messrs. Brooks, Burn, Carr, Dodson, Foster, Hanover, Johnson, Keaton, Larsen, Light, Lynn, Morgan, Odle, Phillips (of Madison), Rector, Riddick, Shoaf, Simpson (of Humphreys), Stovall, Swink, Tarrant, Tucker and Wade—24.

Representatives present and not voting were: Messrs. Anderson, Bell, Dowlen, Ellis, Fisher, Fitzhugh, Griffin, Harris (of Knox), Hickman, Howard, Jeter, Kahn, Leath, Longhurst, McCallman, Moose, Phelan, Phillips (of Hawkins), Travis (of Henry) and Turner—20.

The following explanation was offered by Mr. Crawford, of Bedford:

Mr. Speaker: I herewith hand to the Clerk of the House petitions signed by approximately two thousand citizens of my County requesting me to change my vote on the reconsideration of the 19th Amendment and on the ground that the overwhelming majority of my people which I represent are against this Amendment.

I voted for this Amendment originally because it was recommended both by National and State Democratic Conventions and I was voting in accordance with what I deemed the will of my constituents, however, I find that the majority of my constituents in accordance with the above mentioned petitions are opposed to this Amendment.

This is the sole reason for the change of my vote. I desire that this explanation be spread upon the Journal of the House.

J. S. CRAWFORD.

The following explanation was offered by Mr. Howard:

The Amendment has been heretofore voted upon carried by a constitutional majority certified by the Governor and proclamation certified by Secretary of State and in my opinion is the law of the land and I therefore decline to vote upon the question further.

The following explanation was offered by Mr. W. W. Phillips:

Because I consider that the 19th Amendment has been legally adopted, and that any other action on it by this House would be a farce. I desire to be recorded as present and not voting.

Mr. Riddick offers the following protest:

I protest, challenge and deny the right and power of the House of Representatives to reconsider the vote by which the resolution ratifying the 19th Federal Amendment was adopted.

193 The Federal Constitution gives to the members of the two Houses of the various state legislatures the power to cast the vote of their states upon the question whether it will ratify any proposed amendment. Like every other voting power it can be exercised only once in the same election. In passing on last Wednesday the resolution to ratify we were not legislating, we were casting the vote of Tennessee on this question, Tennessee having voted once can vote no more.

The power to ratify is not a legislative function but is a political power and when once exercised the power is exhausted. In this respect it is exactly like the power of the citizen to vote or the power of the two Houses of the Legislature to elect their officers or certain State officials, like Comptroller, Treasurer, etc. These political powers when once exercised are no longer existent. No one ever heard of a motion to reconsider the election of a speaker or of a United States Senator. Thus can no more be done than can the voter reconsider and recall his vote at the polls after it is cast and counted.

I insist that the power to ratify an amendment to a Federal Constitution is precisely like the political power of a citizen to cast his vote or of a legislature to elect officers, and when once exercised is forever ended so far as that election is concerned.

I therefore deny the power of this House to reconsider or change in any respect its action on this resolution at a former day or the session, and respectfully insist that any attempt to do so would be nugatory and void.

I also protest, challenge and deny the power of this House of Representatives, to now take any action whatever, upon Senate Joint Resolution No. 1, upon the ground that it has already refused to reconsider its action concurring in said resolution, and the Clerk of the House, as required by the rules and by special direction of the House, has returned Senate Joint Resolution No. 1 to the Senate. Having thus parted with the possession of said Joint Resolution No. 1, it is now entirely beyond the jurisdiction and control of this

House and any action it might attempt to take concerning same, would be absolutely nugatory, null and void.

T. K. RIDDICK.

194 Mr. Hall moved that the Clerk of the House be and is hereby instructed to notify the Senate that the House has reconsidered its action on Senate Joint Resolution No. 1 relative to ratifying 19th Amendment and has non-concurred in the Resolution, which motion prevailed.

Thursday, September 2, 1920.

Twenty-fifth Day.

The House met at 10.00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 86 members were found to be present.

The absent members were: Messrs. Canale, Crawford (of Bedford), Davis, Luther, Lynn, Martin (of Hamilton), Miller, Phillips (of Madison), Rowan, Travis (of Franklin), M. E. Whitaker and Wilson, who were excused.

On motion the reading of the Journal was dispensed with.

Message from the Senate.

Mr. Speaker: I am directed to return House Message hereto attached relative to Senate Joint Resolution No. 1, relative to the ratifying the 19th Amendment to the Constitution of the United States upon the following motion:

Mr. Hill moved that the message be returned to the House for the reason that the whole question was out of the hands of the Senate, and the Senate has no jurisdiction.

CARTER,

Clerk.

Mr. Hall moved that the House return the message to the Senate. The motion prevailed by the following vote:

Ayes	43
Noes	29
Present and not voting.....	8

195 Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Carr, Cassidy, Check, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hays, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Swift, Throneberry, Vinson, Weldon, L. M. Whitaker, Whittfield, Wolfenberger, Womack and Mr. Speaker Walker—43.

Representatives voting no were: Messrs. Bell, Burns, Dodson, Dowlen, Fisher, Fitzhugh, Foster, Griffin, Hanover, Howard, Jeter, Kahn, Keaton, Larsen, Light, Longhurst, Lynn, McCalmann, Morgan, Moose, Odle, Phelan, Riddick, Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker and Wade—29.

Representatives present and not voting were: Messrs. Anderson, Brooks, Ellis, Harris (of Knox), Johnson, Leath, Rector, Simpson (of Bradley)—8.

Thursday, September 2, 1920.

Twenty-fifth Day.

The House met at 10.00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 86 members were found to be present.

The absent members were: Messrs. Canale, Crawford (of Bedford), Davis, Luther, Lynn, Martin (of Hamilton), Miller, Phillips (of Madison), Rowan, Travis (of Franklin), M. E. Whitaker and Wilson, who were excused.

On motion the reading of the Journal was dispensed with.

Message from the Senate.

Mr. Speaker: I am directed to return House Message hereto attached relative to Senate Joint Resolution No. 1, relative to the
196 ratifying of the 19th Amendment to the Constitution of the United States upon the following motion:

Mr. Hill moved that the message be returned to the House for the reason that the whole question was out of the hands of the Senate and the Senate has no jurisdiction.

CARTER,

Clerk.

Mr. Hall moved that the House return the message to the Senate. The motion prevailed by the following vote:

Ayes	43
Noes	29
Present and not voting.....	8

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Carr, Cassady, Cheek, Cole, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hays, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Swift, Throneberry, Vinson, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger, Womack and Mr. Speaker Walker—43.

Representatives voting no were: Messrs. Bell, Burn, Dodson, Dowlen, Fisher, Fitzhugh, Foster, Griffin, Hanover, Howard, Jeter, Kahn, Keaton, Larsen, Light, Longhurst, Lynn, McCalman, Morgan, Moose, Odle, Phelan, Riddick, Simpson (of Humphreys), Stovall, Swink, Travis (of Henry), Tucker and Wade—29.

Representatives present and not voting were: Messrs. Anderson, Brooks, Ellis, Harris (of Knox), Johnson, Leath, Rector, Simpson (of Bradley)—8.

Thursday, September 2, 1920.

Twenty-fifth Day.

The House met at 10.00 A. M. and was called to order by Mr. Speaker Walker.

The proceedings were opened with prayer by the Chaplain, Rev. R. V. Cawthon.

On a call of the roll 88 members were found to be present.

The absent members were: Messrs. Canale, Crawford (of Bedford), Davis, Luther, Martin (of Washington), Martin (of Hamilton), Miller, Rowan, Travis (of Franklin), M. E. Whitaker and Wilson, who were excused.

On motion the reading of the Journal was dispensed with.

Mr. Hall offered the following written motion:

Mr. Speaker: I move that a Committee of three be appointed by the Speaker of the House to secure sworn transcripts of the Journal of both Houses relative to the non-concurrence by the House in Senate Joint Resolution No. 1 and that the Committee furnish same to the Governor with the request from the House that he certify the action of the House to the Secretary of State of the United States.

The motion prevailed by the following vote:

Ayes	43
Noes	36
Present and not voting	1

Representatives voting aye were: Messrs. Bond, Boyd, Boyer, Bratton, Carter, Carr, Cassady, Cheek, Crawford (of Fayette), Dunlap, Forsythe, Francisco, Frogge, Gilbreath, Hall, Harville, Hays, Jackson, Keisling, Long, McMurray, Millican, Montgomery, Moore, Norvell, Oldham, Overton, Rucker, Russell, Sharpe, Sipes, Skidmore, Smith, Story, Swift, Throneberry, Vincent, Weldon, L. M. Whitaker, Whitfield, Wolfenbarger, Womack and Mr. Speaker Walker—43.

Representatives voting no were: Messrs. Burns, Dodson, Dowlen, Ellis, Fisher, Fitzhugh, Foster, Griffin, Hanover, Harris (of Knox), Hickman, Howard, Jeter, Johnson, Kahn, Keaton, Larsen, Leath, Light, Lynn, McCalman, Morgan, Moose, Odle, Phelan, Phillips (of Madison), Riddick, Shoaf, Simpson (of Bradley), Simpson

(of Humphreys), Stovall, Swink, Travis (of Henry), Tucker, Turner and Wade—36.

198 The representative present and not voting was: Mr. Rector—1.

I hereby certify that the foregoing is a true and correct copy of the House Journal of the Sixty-first General Assembly of the State of Tennessee, in Extraordinary Session assembled, with reference to each and every proceeding had on Senate Joint Resolution No. 1—Relative to ratifying the 19th Amendment, on August 31st, 1920, and each and every proceeding had thereafter.

J. D. GREEN,

Chief Clerk of the House of Representatives.

Subscribed and sworn to before me this 2nd day of September 1920.

[SEAL.]

ETHEL L. HOLT,

Notary Public.

Prayers.

At the conclusion of testimony taken on both sides, the petitioners offered the following thirteen prayers which the Court refused.

Petitioners' First Prayer.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is not an amendment within the scope of the grant of power to amend contained in Article V of said Constitution.

Petitioners' Second Prayer.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is in conflict with the proviso contained in Article V of the Constitution of the United States.

Petitioners' Third Prayer.

199 The Court rules as matter of law that a State's suffrage in the Senate means the votes cast in the Senate by Senators elected in the State by the people thereof through Electors who possess the qualifications of Electors of the most numerous branch of the State's Legislature, which qualifications are prescribed and determined by the State in its Constitution or laws, and any purported amendment to the Federal Constitution which nullifies, substitutes or alters the qualifications of such Electors so prescribed and determined by the State, so as to confer the power of electing Senators upon persons on whom the State has not conferred it, or to deny, diminish or dilute such power in the persons upon whom the State has conferred it, operates to deprive the State

of its suffrage in the Senate, and that the alleged Nineteenth Amendment would so operate.

Petitioners' Fourth Prayer.

The Court rules as matter of law that the consent of a State to such changes in the Federal Constitution as by the provisions of Article V require such consent, can only be expressed, whether directly or indirectly, through the voice of the majority of those persons upon whom it has conferred through its Constitution and laws the power to vote, and that any measure which confers such power upon other and different persons or denies, diminishes or dilutes such power in those upon whom the State has conferred it, deprives the State of its power by any means to consent to such changes or amendments, and is inconsistent with the proviso contained in Article 5 of the Constitution of the United States, and that the alleged Nineteenth Amendment is such a measure.

Petitioners' Fifth Prayer.

The Court rules as matter of law that if it find that under the provisions of the Constitution of Tennessee, offered in evidence the Legislature of Tennessee elected prior to the submission of the Nineteenth Amendment by the Congress to the Legislatures of the several States was without authority to act thereon (such being the law of Tennessee) then in determining whether such Amendment has been ratified by the Legislatures of three-fourths of the States any vote purported to have been given by the Legislature of Tennessee must be disregarded.

Petitioners' Sixth Prayer.

The Court rules as matter of law that if it shall find as a fact that by the law of Tennessee the entry upon the Journal of either House of its Legislature of a motion to reconsider the vote by which a bill or resolution was passed or failed of passage has the effect to suspend the operation of such vote until such motion has been acted upon, and if it shall further find that by said law the action of less than a quorum of either House in acting upon such a motion to reconsider is a mere nullity, and if it shall further find that by said law where the Journal of the House offered in evidence shows that a motion to reconsider a vote by which a resolution to ratify the alleged Nineteenth Amendment of the Constitution of the United States was passed was subsequently adopted and the resolution reconsidered and upon such reconsideration such resolution failed of passage and was defeated by a majority of the votes in said House, a quorum being present, then the said resolution was not passed by the Legislature of Tennessee (such being the law of that State), then in determining whether said Amendment has been ratified by the Legislatures of three-fourths of the States the vote

in favor of ratification so purported to have been given by the Legislature of Tennessee must be disregarded.

Petitioners' Seventh Prayer.

The Court rules as matter of law that if it shall find as a fact that by the law of West Virginia, when the Journals of either House of its Legislature being offered in evidence show in clear language that a resolution was defeated in such House and that a motion to reconsider the vote by which it was defeated was likewise defeated, and that under the rules of such House also offered in evidence the question so decided must stand as the judgment of that House and cannot during the session be drawn again into debate, then such resolution is not a resolution passed by the Legislature of West Virginia, notwithstanding without suspension of the rules the

201 said House may have subsequently during the same session voted upon the same question, and notwithstanding such resolution should appear to have been signed by the presiding officers of both Houses and by the Chairman of the respective Committees on enrolled bills, and to have been approved by the Governor, then (such being the law of the State of West Virginia) such resolution if it purport to ratify the alleged Nineteenth Amendment to the Constitution of the United States is without effect and in determining whether such Amendment has been ratified by the Legislatures of three-fourths of the States the vote so purported to have been given by the Legislature of West Virginia must be disregarded.

Petitioners' Eighth Prayer.

The Court rules as matter of law that if it find that under the provisions of the Constitution of Missouri offered in evidence any resolution of the Legislature of that State purporting to ratify an amendment to the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of that State is without effect (such being the law of Missouri) then in determining whether such an amendment has been ratified by the Legislatures of three-fourths of the States any resolution in favor of such ratification that may have been passed by the Legislature of Missouri must be disregarded; and the Court further rules in the absence of any evidence of the construction placed by the Courts of Missouri on said provision of their State Constitution that the alleged Nineteenth Amendment is such an amendment as may impair the right of local self-government belonging to the people of Missouri.

Petitioners' Ninth Prayer.

The Court rules as matter of law that the grant of power to amend the Constitution of the United States contained in Article V is subject to the conditions under which the Constitution was originally adopted by the people of the United States, and that among such

conditions are the express saving and reservation of powers in the States and the people as stated in the Ninth and Tenth Amendments whose adoption was by the people of the several States made a condition of their ratification of the Constitution, and that no power therefore exists against the consent of any State to adopt an Amendment in derogation of the powers so saved and reserved.

Petitioners' Tenth Prayer.

The Court rules as matter of law that the grant of power to amend the Constitution of the United States contained in Article V is subject to the express limitation contained in the provision of Article IV that the United States shall guarantee to every State a republican form of government, and that a republican form of government can only subsist where, under representative institutions, the people inhabiting the territory over which such government extends, enjoy the power to prescribe and determine what qualifications must be possessed by such of the said inhabitants as they may desire to clothe with the rights and duties of voters, and that a deprivation of such power is beyond the competency of any agency of the people of the United States, established by them in the same Constitution containing the aforementioned guaranty.

Petitioners' Eleventh Prayer.

The Court rules as matter of law that the power to amend the Constitution of the United States, granted by Article V, does not include the power to amend the Constitution of any State, if the last mentioned term be understood to mean such part of the formal instrument known as the Constitution of such State as establishes or defines its government or political structure.

Petitioners' Twelfth Prayer.

The Court rules as matter of law that the efficacy of the provisions of the 15th Amendment in all matters to which they are applicable, including the election of United States Senators, cannot be disputed, but the effect of said Amendment as a precedent in Constitutional law to determine the validity of other measures subsequently proposed and ratified without the consent of this State, even though couched in similar language, may be deemed to be circumscribed by the historical facts relating to the purpose underlying said 15th Amendment and the objects sought to be accomplished at the time of its proposal, as well as by the historical facts relating to the methods by which and the conditions under which its formal proposal and ratification, as duly proclaimed by the Secretary of State, had been accomplished or secured, including such elements of compulsion or force as history relates in the premises, and also the historical facts as to whatever element of vis major may have led to the silent acquiescence in its validity upon the part of such States, or the people thereof, as had not consented to its ratification.

Petitioners' Thirteenth Prayer.

The Court rules that the certificates put in evidence by the respondents purporting to certify to the ratification of the Federal Suffrage Amendment by the legislatures of the States of West Virginia and Tennessee, do not comply with the requirements of Section 205 of the U. S. Revised Statutes in that they do not certify that said amendment was adopted by said respective legislatures "according to the provisions of the Constitution" of the United States, and the Court rules that said certificates are of no virtue or effect in forming the basis or justification of the proclamation of the Secretary of State of the United States, and that said proclamation was therefore irregular and invalid.

To which action of the Court in refusing said prayers offered by petitioners, petitioners excepted and prayed the Court to sign this, their Bill of Exceptions, which is accordingly done this 7th day of March, 1921.

CHAS. W. HEUISLER.

Truly taken.

Test :

_____,
Clerk Court Common Pleas.

204 Appellants' Costs, \$9.25.
 Appellees' Costs, \$7.00.

STATE OF MARYLAND,
Baltimore City, set:

I, Adam Deupert, Clerk of the Court of Common Pleas, in the Eighth Judicial Circuit of the State of Maryland, do hereby certify that the foregoing is truly taken from the records of proceedings of the Court of Common Pleas in the case therein mentioned.

In Testimony Whereof, I hereto set my hand and affix the seal of said Court, this 8th day of March, 1921.

[SEAL.]

ADAM DEUPERT,
Clerk Court Common Pleas.

205 MARYLAND, *set:*

At the Court of Appeals of the said State, begun and held at the City of Annapolis, in and for said State, on the first Monday of April (being the fourth day of the said month) in the year of our Lord, one thousand nine hundred and twenty-one, and in the one hundred and forty-fifth year of the Independence of the United States of America, were present, in consultation:

Chief Judge Boyd; Judges Briscoe, Thomas, Pattison, Urner, Stockbridge, Adkins, Offutt.

C. C. MAGRUDER,
Clerk.

Among other were the following proceedings, to-wit:

206 In the Court of Appeals of Maryland, April Term, 1921.

OSCAR LESER et al.

vs.

J. MERCER GARNETT et al., Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City

Appeal from the Court of Common Pleas of Baltimore City.

Judge OFFUTT delivered the opinion of the Court.

Cecelia Street Waters, a white woman, and Mary D. Randolph, a colored woman, both citizens of Maryland, applied on October 12th, 1920, to the Board of Registry of the 7th Precinct of the Eleventh Ward of Baltimore City for registration as qualified voters therein. Aside from their sex, the applicants possessed the qualifications prescribed by the Constitution and laws of this State entitling them to the registration for which they applied. At the time they applied for registration Mr. Oscar Leser, on his own behalf, and on 207 behalf of the Maryland League for State Defense, challenged the right of each of the applicants to register as a qualified voter, on the grounds, first, that the applicants were female citizens of the State whereas the Constitution of Maryland confirmed the right of suffrage to males, and second, that neither of them was entitled to register under the Nineteenth Amendment to the Constitution of the United States, because that Amendment had never been "legally proposed, ratified or adopted as a part of the Constitution", and was invalid because it was "in excess of any power to amend the Constitution of the United States, conferred by the provisions of Article 5" of that Constitution. The challenges were overruled and the applicants duly registered.

Thereafter, on October 30th, 1920, Mr. Leser, and other citizens of Maryland, who were also members of the Board of Managers of the Maryland League for State Defense filed a petition in the Court of Common Pleas of Baltimore City, in which the petitioners stated that they were aggrieved by the action of the Board of Registry in registering the names of the two women to whom we have referred, and asked that their names be stricken from the registry of voters of the precinct in which they were registered. In this petition the petitioners rest their claim for relief upon the following ground;

208 " (1) The said alleged amendment to the United States Constitution is not such an amendment as the Congress is authorized by Article V of the Constitution of the United States to propose to the legislatures of the several states to be by them ratified in accordance with said Article V, but is wholly outside of the scope and purpose of the amending power conferred upon Congress, subject to the ratification by three-fourths of the State Legislatures, by the said article, as is more fully and expressly set forth in the

resolution of the General Assembly of Maryland rejecting and refusing to ratify the said amendment at the January Session of 1920."

Second, "That the said alleged Nineteenth Amendment to the Constitution of the United States was never in fact ratified by the Legislatures of three-fourths of the States now composing the United States of America, the proclamation dated August —, 1920, by the Honorable Bainbridge Colby, Secretary of State of the United States, to the contrary notwithstanding.

(a) Because of the fact that it was not ratified by the Legislature of the State of West Virginia, but on the contrary was defeated and rejected by the said Legislature."

Third, "And because although the Legislature of the State of Missouri undertook to pass a resolution ratifying the said measure, nevertheless it was forbidden to do so by the following provision of the Constitution of the State of Missouri:

"Article II, Section 3. We declare, that Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

209 Fourth, "Because of the Legislature of the State of Tennessee being a body corporate created under and in pursuance of the Constitution of the said State and subject to the limitations therein expressed, undertook to act upon a resolution purporting to ratify the said alleged Nineteenth Amendment, yet its action in the premises was null and void for the reason that the members of the said legislature were elected prior to the submission of the said amendment by Congress to the Legislatures of the several States, and therefore by the provisions of the Constitution of the State of Tennessee, the said existing Legislature was prohibited from acting upon said alleged amendment. The provision of said Constitution being as follows:

"No convention or General Assembly shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such amendment has been submitted

And because even if the Legislature of the State of Tennessee at its session held in the month of August, 1920, were competent to act in the matter of ratification of the said amendment to the Constitution of the United States, the said legislature did not pass any resolution ratifying the said alleged Nineteenth Amendment, but did in fact, defeat and reject such resolution.

And fifth. "That in a number of the States of the American Union, including the States of Massachusetts, New Jersey, Pennsylvania, Rhode Island, Arkansas, Maine, New Hampshire, Ohio, Iowa, Nebraska, Missouri, Texas, Kentucky and others, the people have seen fit to provide in their State Constitutions that the rights and duties pertaining to the elective franchise shall be limited to men. In these States the people have also provided that no changes should be made in their State Constitutions by any act or resolution of their State Legislatures and have thereby in effect forbidden their said respective State Legislatures to vote for the ratification of any proposed amendment to the Constitution of the United States which would have the effect of abolishing or changing the Constitution of the State."

210 In answer to this petition the respondents asserted, first, that the Court was without jurisdiction to determine "the matters alleged in said petition, because to do so would be to deny full faith and credit in this State to the public Acts, Records, and Judicial Proceedings of other States, in violation of Section 1 of Article 4 of the Constitution of the United States, and to question the validity of an official act duly performed by the Secretary of State of the United States", and because no application was ever made to the appellees to strike from the list of persons registered as qualified voters the two women alleged to have improperly registered, nor were their names placed upon the "suspected" list, nor any "other legal proceeding taken "before the appellees to prevent the registration of said persons or to strike their names from the list of qualified voters in said precinct, nor any hearing had before the appellees in reference to the right of the persons named to register in said precinct, and second, that the two women were not disqualified under the Constitution of the State of Maryland, or of the United States from voting at any election" hereafter to be held.

Testimony was offered in support of the petition, and thirteen prayers presenting the legal propositions advanced by the appellants submitted, and after a hearing these prayers were refused
211 and the petition dismissed. From that order this appeal was taken.

The substantial questions presented by the appeal are, first, whether the Court of Common Pleas of Baltimore City had jurisdiction to pass upon the matters contained in the petition; and second, whether the Nineteenth Amendment of the Constitution of the United States was validly adopted and ratified and is binding upon the several States of the Union and the people thereof, and we will consider these questions in the order in which we have stated them.

The appellee contended that "The Court was without jurisdiction to entertain the petition because the Petitioners did not bring themselves within the provisions of the Election Law authorizing petitions to strike names from the books of registry, and because it does not appear that any summons was served upon either of the persons registered," but we are unable to assent to the proposition thus stated, nor do we regard the decisions of this Court cited in support of it as applicable to the facts of this case. Those facts are that when the

two women to whom we have referred applied to the Board of Registry to be registered as qualified voters, Mr. Oscar Leser, a citizen of Maryland and a resident of Baltimore City, in their presence challenged their right to register and filed at the same time with the

Board of Registry a written memorandum of the grounds
212 of the challenge, and thereupon "the Board conferred and announced a decision overruling" the challenge and allowed the applicants to register, and a formal entry was made on the registration book of the challenge, the filing of the memorandum and the action of the Board thereon.

Section 19 Article 33 C. P. G. L. which provides that "any voter shall be permitted to be present at the place of registration in any precinct of his county or city, and shall have the right to challenge any applicant, and when challenged such applicant shall be carefully questioned by the Board of Registry touching the facts which entitle him to register in such precinct, and thereupon, if a majority of the board is convinced that such applicant is a qualified voter, he shall be entered as qualified," was obviously designed to permit the very procedure which was adopted in this case. Indeed no other conclusion can be reached unless the plain and explicit language of that section is disregarded. Its purpose is to afford an opportunity for objection to the registration of a voter before his name has been placed on the registration book, while section 20 of the same Article which provides that: "If any voter of the ward or county shall go before the Board of Registry during such sessions and make oath that he believes any specified person upon such registry is not a qualified voter, such fact shall be noted," is designed

to supply in part the procedure for striking off the name of a
213 voter after it has been placed on the register. Nor is there anything in the history of the position of the section to indicate that its application is not general, and the right to object to the registration of a disqualified person at the time of his application must have been within the contemplation of the Legislature when it provided in section 25 of the same Act that "any person who feels aggrieved by the action of any Board of Registry in refusing to register him as a qualified voter, or in erasing or misspelling his name, or that of any other person on the registry, or in registering or failing to erase the name of any fictitious, deceased or disqualified person, may at any time, either before or after the last session of the Board of Registry, but not later than the Saturday next preceding the election, if in the city of Baltimore, and not later than the Tuesday next preceding the election, if in the counties, file a petition verified by affidavit, in the Circuit Court for the county, or if the cause of complaint arises in Baltimore City, in any court of Baltimore city, setting forth the ground of his application, and asking to have the registry corrected." And that section was designed to protect the right created by section 19 *Ibid* by allowing a review of the action of the Board of Registry in regard to it.

Nor are the cases to which our attention has been called in conflict with this view. In *Collier vs. Carter* 100 Md. 381 the petition

was filed for the purpose of having the name of one Brady
214 which was on the registration lists as that of a qualified voter,
stricken therefrom. It contained "no suggestion of having
for its object a review of any action taken or judgment rendered else-
where," but in effect asked the Court to exercise an original and not
an appellate jurisdiction. And in *Wilson vs. Carter* 103 Md. 120,
the facts were that the Board of Registry refused at the request of
one of its members to place the name of a registered voter on the
"suspected list" and "refused to take any action whatever" upon
the request, and their non action was the basis of the petition in
that case. The reason given for the request was that the building
given as the residence of the voter was burned down, but there was
no affidavit or other proof of that fact as required by Section 20 in
such cases, nor was there any hearing upon the request. In *Smith*
vs. McCormick 105 Md. 224, a petition was filed to strike the name
of Thomas Carney from the registration lists of Baltimore City on
the ground that he was not a qualified voter, and it appeared that
his name had never been put on the "suspected list," and that his
right to register had never been brought to the attention of the
Board of Registry of the precinct in which he was registered and
that no action was taken by that Board as to it, and in *Hanson vs.*
Daley 129 Md. 288, in which the petition was filed to have the name
of Harry J. Daly stricken from the registration lists of Baltimore

City on the grounds that he was not a qualified voter, it ap-
215 peared that his name had never been placed on the suspected
list but it did not appear that any objection to his right to
register had ever been made to the Board of Registry. The reason
for the decision in each of those cases was very plainly stated by this
Court, speaking through Judge Burke, in *Smith vs. McCormick*
105 Md. 226, in which it said, "the Courts have been uniform in
holding, that their jurisdiction in such matters was appellate, and
not original, and that unless there was some action taken by the
officers of registration upon objections properly before them as to
the registration of a disqualified person the Court was without power
to review or correct any error committed by those officers." But in
this case it does clearly appear that the objection to the registration
of the applicants was brought directly to the attention of the Board
and that they formally acted on it. Nor is there any force in the
contention that the applicants had no notice. They needed no
formal notice because they were present and participated in the pro-
ceeding. The section itself does not provide for any notice because
under it the challenge is made in the presence of the applicant and
before he registers. Under such circumstances any other or further
notice would be an idle and meaningless ceremony.

For the reasons assigned we are of the opinion that the Court of
Common pleas did have jurisdiction in this case.

This brings us to the consideration of the second and principal
question presented by the appeal, and that is, whether the
216 Nineteenth Amendment of the Constitution of the United
States was validly adopted and ratified and is binding upon
the several States of the Union and the people thereof.

In the beginning, it may be well to restate what has become trite from over repetition, the functions, the powers and the limitations of this Court in dealing with such questions. This is a Court of Law. Its function is to ascertain, state and apply the law in its relation to facts involved in litigation before it. It is authorized to interpret and apply the principles of existing law. But whilst it may apply old and long established principles to new uses it cannot make new law. Nor can it do what is in effect the same thing, modify, amend or repeal existing law. In the exercise of these duties and functions, this Court must concede to the Constitution and Statutes of the United States and the decisions of the Supreme Court construing the same a binding and permanent force as have, when not in conflict with the Federal Constitution, the Constitution and laws of this State and the decisions of this Court dealing with them. With the wisdom, the expediency or the effect of such laws we have properly nothing to do except in so far as those considerations may aid in the construction of the law.

In dealing therefore with this question we are constrained to look only at what the law is, and not at the effect of the law, and whether the Constitution has by a series of amendments been changed
217 from a guarantee of the form and permanency of our government or whether those amendments do change the form of our government, as was argued, are considerations which while of profound interest to all citizens nevertheless cannot affect our judgment as to the validity of the amendment. Whether a thing is wise or unwise, is one thing, whether it is unlawful is another. The determination of the first question is for the legislature and of the second, for the Courts. We have restated these principles which have been so frequently laid down by this Court, because we are asked in this case, in effect, to assume and exercise a power essentially legislative in character, and to go beyond the letter of the amending clause of the Constitution, and to read into it an implied prohibition limiting and restricting its application.

We will now turn to the main question and that is, whether the Nineteenth Amendment to the Constitution was validly adopted and ratified. The appellants contend that it was not, and in support of that contention they submit two propositions, one that it was not within the amending power of the Constitution, and the other that if it is within such power, it was not ratified by the requisite number of States.

In dealing with the first of these propositions we are met at the threshold of our inquiry by the fact that the Supreme Court has in effect passed upon the proposition and has found it untenable and unsound, and what ever may be the powers of that Court in regard to correcting or overruling its own decisions relating to the
218 construction or the interpretation of the Constitution of the United States, manifestly this Court is without any such power, but on the contrary it must recognize the binding force of such decisions and be controlled by them.

The fifteenth amendment provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the

United States or by any State on account of race, color or previous condition of servitude." It was proposed to the Legislature of the several States on February 27, 1869, and was declared on March 30, 1870, to have been ratified by 29 of the 37 States.

The Nineteenth Amendment provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex," and was on August 25, 1920 declared to have been ratified by 36 of the 48 States. The only difference between the two amendments is that while the Fifteenth Amendment prohibits discrimination by the States or the Nation against citizens in regard to suffrage on account of "race, color or previous condition of servitude," the Nineteenth Amendment forbids such discrimination on account of "sex." In other words it but adds the word "sex" to the words "race color or previous condition of servitude" occurring in the clause of the Fifteenth Amendment which forbids discrimination against certain classes of citizens in regard to their right to vote, and thus brings another class of citizens within the reach of the prohibition against discrimination on the part of the States or of the United States in conferring the right of suffrage.

If therefore the Fifteenth Amendment was a valid exercise of the amending power, it is impossible to conceive that the Nineteenth Amendment was not likewise a valid exercise of that power, because it is not possible to distinguish the two in principle.

But the Fifteenth Amendment has been repeatedly recognized by the Supreme Court as within the amending power and treated as an integral part of the Constitution. In *U. S. vs. Reese* 92 U. S. 214, in which two election officials were indicted for refusing to receive and count the vote of a citizen of the United States of African descent at a Municipal election that Court in 1875 said: "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment, there was no constitutional guaranty against this discrimination; now there

is. It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude." And in *Neal vs. Delaware* 103 U. S. 370 (1881) a case in which a colored man indicted in the State of Delaware for a crime punishable by death, sought to have his case removed to a Federal Court on the ground that as the Constitution of Delaware restricted the right of suffrage to "white" male citizen and that as the members of the grand

jury which indicted him and the petit jury which had been summoned to try him were in practice taken from the list of voters and that as under the Constitution of Delaware the names of colored citizens were not included in that list, none appeared on the panels of the grand or petit juries, and that he was in consequence deprived of the equal protection of the law, in dealing with that question, the Court said: "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualification of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the

221 State recognizes, as is its plain duty, an Amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to an inconsistent provisions in its own constitution or statutes. In this case that presumption is strengthened, and, indeed, becomes conclusive, not only by the direct adjudication of the State Court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication, since the adoption of the Fifteenth Amendment, indicating that the State, by its constituted authorities does not recognize, in the fullest legal sense, the binding force of that Amendment and its effect in modifying the State Constitution upon the subject of suffrage." And later in 1915, in *Guinn vs. United States* 238 U. S. 347 in which the question of negro suffrage was before the Court, in speaking of the effect of the Fifteenth Amendment, through the late Chief Justice White, it said:

"(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the
ground. In fact, the very command of the Amendment
222 recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify, or deprive the states of their full power as to suffrage except, of course, as to the subject with which the Amendment deals and to

the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both."

And in *Myers vs. Anderson* 238 U. S. 368, in which the question presented was the liability of Election officers for denying suffrage to negro citizens in violation of the guaranties of the Fifteenth Amendment and of certain statutes of the United States enacted for the purpose of insuring the protection offered by the Amendment, the Court said: "The qualification of voters under the Constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere
223 change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that although the 15th Amendment by its self-operative force, without any action of the state, changed the clause in the Constitution of the state of Maryland conferring suffrage upon 'every white male citizen' so as to cause it to read 'every male citizen,' nevertheless the Amendment was so supine, so devoid of effect, as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the state, and for the state officers to make the result of such action successfully operative."

In view of these decisions, the right of the Congress of the United States to propose amendments to the Constitution thereof forbidding the United States and the several states from discriminating against any class of its citizens in regard to their rights to vote can not now be called in question, but must be regarded as finally settled. Nor could any useful end be served by commenting in this opinion upon the reasons or the absence of reasons for those decisions. They have been made and now stand as a part of the law of the land and we at
least are bound by them.

224 It was contended that the 15th Amendment was a "War"

Amendment adopted at a time when men's passions and prejudices were aroused, and when restraints or limitations of any kind were irksome and intolerable, and when the people were impatient and intolerant of anything that stood in the way of their will, and were unwilling to be shackled or hindered in the execution of their plans by mere Constitutional limitations, and that therefore the adoption of this Amendment should not be accepted as a precedent, nor the decisions recognizing its validity accepted as conclusive of this case for that reason and for the further reason that the 15th Amendment had been acquiesced in for so long that such acquiescence was in itself equivalent to an express ratification by the States.

But we cannot, in the face of the direct language of the Constitu-

tion describing the manner in which it may be amended recognize the doctrine of amendment by acquiescence as a valid substitute for that method. Nor can we assume, no matter what the state of the public mind may have been, that the Court charged with the duty of guarding and supporting the Constitution, tacitly ratified its violation, but we must on the contrary assume, that when it recognized the validity of the amendment, it did so in the belief that it was within the amending power of the Constitution.

Nor can we assume because the Court did not, in the cases to which we have referred, specifically discuss the extent of the amending power of the Constitution as affecting the validity of the 15th Amendment, but assumed without assigning reasons for its conclusion that the amendment was valid, that it did not consider every question involved in its conclusion. Nor can it be assumed that it permitted its conclusions to rest upon the authority of an amendment which was proposed, adopted and ratified in violation of the Constitution, whether that question was or was not directly put in issue by the pleadings or the arguments in the case. And when therefore in the cases cited, it based its decisions upon the assumption that the 15th Amendment is a valid Amendment, we are bound by those decisions to assume that it is a valid Amendment, and within the Amending power, for there can be no other conclusion. The only power of amending the Constitution is that furnished by itself. Unless any amendment, the validity of which is questioned, can be brought within that power it must fall. When therefore, the validity of an amendment is upheld by competent authority it can only be upon the theory that is within the Amending power of the Constitution, and when the Supreme Court assumed the validity of the 15th Amendment it necessarily decided that it was within the Amending power. And as the Nineteenth Amendment cannot be distinguished in principle from the Fifteenth Amendment it follows that it is within the Amending power.

In view of this conclusion it becomes unnecessary to consider further the contrary contention which was presented with so much force and sincerity in this Court.

226 Whilst the arguments supporting that contention might have great weight if the question were *and* open one, yet in view of the decisions of the Supreme Court it must be regarded as finally closed.

This brings us to the second proposition which is that the Amendment was not ratified by 36 States.

Mr. Bainbridge Colby, the Secretary of State, on August 26th proclaimed, that the 19th Amendment had been ratified by 36 States including the States of Missouri, Tennessee and West Virginia. The petitioners, however, contended that it never was validly ratified by the States of Missouri, Tennessee or West Virginia, first because under the Constitutions of Missouri and Tennessee, the Legislatures which ratified the Amendment, were without any power or authority to do so, and second, that the action of the Legislatures of Tennessee and West Virginia in ratifying the amendment was in violation of their

own rules of procedure and of the respective Constitutions of those States.

The first reason rests upon the following provisions of the Constitutions respectively of the States of Missouri and Tennessee, Constitution of Missouri, Article 2, Section 3: "Local self-government not to be impaired.—That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible union, and were intended to co-exist with it, the Legislature is not authorized to adopt, 227 nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State."

Constitution of Tennessee, Article 2, Section 32: "Amendments to Constitution of the United States: No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such convention or general assembly shall have been elected after such amendment is submitted."

It being conceded that the Legislature of Tennessee which ratified the amendment was elected before it was proposed, the question is whether these constitutional provisions are valid limitations upon the amending power created by the 5th Amendment of the Constitution of the United States.

Here again the question which we are called upon to consider has already been answered by the highest Court authorized to deal with the matter which has decided that the people of any one of the several States, cannot impose any limitations upon the amending power of the Constitution, and in our opinion the conclusion there reached was in obvious accord with the purpose and intent of the 5th Amendment. That Amendment provides that an amendment of the Constitution when proposed by two-thirds of the members of each branch of the Congress of the United States shall be adopted

whenever ratified by the Legislatures or Conventions called 228 to consider the question of three-fourths of the States. If,

however, the people of the several States could by State Constitutions take away or limit the rights of such legislatures or conventions to so ratify a proposed amendment to the Constitution, then they could by the exercise of that power nullify and destroy the power of amendment conferred by the 5th Amendment which is a part of the Constitution, and so could by such action amend it in one of its most important and vital elements in a manner not provided by it. Such a conclusion ignores the fundamental distinction between the rights and privileges of the people of the United States in the enactment of legislation in the respective States of which they may be citizens in respect to matters peculiar to the local government of such States, and their rights and privileges when dealing with legislation affecting the people of all the States. The power in the one case is derived from the people of the State, and is an inherent attribute of its sovereignty, while in the other it is

drawn from the Federal Constitution. The power of the people of the United States in their relation to it is limited and defined by the express grants of the Constitution while their power in their relation to governments of the States of which they are citizens is the residuum which is found after subtracting the powers granted in the Federal Constitution by the people of the State to the Federal Government from the sum of the powers possessed by the people of the State in their collective character as a sovereign State. The right to amend

the laws and constitutions of the several States possessed by
229 the people thereof is natural and inherent and is incident to the sovereignty of the States, but the right to amend the Constitution of the United States rests solely upon the provisions of the Constitution of the United States.

Having granted the power to amend that Constitution to the people of all the States manifestly the people of the several States cannot, acting separately, exercise the very power they have granted away.

This conclusion is in accord with the decisions in the two cases of *Hawke vs. Smith*, No. 1, 253 U. S. 221, and *Hawke vs. Smith*, No. 2, *Ibid.*, 231, both of which dealt with the validity of a provision of the Ohio Constitution extending the referendum to the ratification by the General Assembly of that State to proposed Amendments of the Federal Constitution. In dealing with that question the Court in the case first cited, which related to the reference of the action of the General Assembly in ratifying the 18th Amendment to the people of Ohio under the provision of the State Constitution referred to, said: "The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article. * * * The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and
230 is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge v. Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."

In *Hawke vs. Smith*, No. 2 *supra*, in which the same question was presented except that the Amendment involved there was the 19th Amendment the Court reached the same conclusion.

And in the National Prohibition cases 253 U. S. 386, the Court again said: "The referendum provisions of State Constitutions and Statutes cannot be applied consistently with the Constitution of the United States in the ratification or rejection of Amendments to it."

The facts upon which the contention that the Amendment was

not ratified by the legislatures of West Virginia and Tennessee is based are substantially these:

The Governor of West Virginia convened the Legislature of that State in extra session on February 27, 1920. On the same day a Joint Resolution ratifying the proposed 19th Amendment was offered in the Senate. On March 1st, 1920, this Resolution was defeated, and on March 30th a motion to reconsider that action was
231 lost. But on March 8th the Senate received a message from the House announcing the passage by that body of the Resolution. Objection was made to the further consideration of the Resolution on the ground that the question having once been acted upon and disposed of and the action disposing of it reconsidered and affirmed, it could not again be considered by the Senate, under Rule 52 of that body which reads as follows: "52. The question being once determined, must stand as the judgment of the Senate, and cannot during the session be drawn again into the debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding days." Notwithstanding the objection the Resolution passed the Senate on March 10th, 1920 and the action of the Legislature — certified to the Department of State.

In Tennessee the Legislature was also convened by the Governor in extra session. It met on August 9th, 1920, and on August 10th a Joint Resolution ratifying the proposed 19th Amendment was offered in the Senate, passed by it on August 13th, 1920, and sent to the House, which on August 18, 1920 concurred in the action of the Senate. On the same day a motion was made to reconsider the action of the House in concurring. On August 21st, there was a motion to call from the Journal the motion to reconsider, but it was declared out of order by the Speaker on the ground that a quorum of the members of the House was not present. Although this ruling
232 was supported by the roll call it was overruled by a majority of those present, and the motion to reconsider voted on and lost. On August 31st, the absentees having returned, the proceedings under which the motion to reconsider had been defeated were expunged from the Journal, and the motion adopted, and the House then passed a motion to non concur in the action of the Senate ratifying the Amendment. In the meantime, and before this action had been taken, the Governor of Tennessee had on August 24th certified to the Federal Government that the Amendment had been ratified by the General Assembly of the State of Tennessee. No particular difficulty is presented by the appellant's contention in regard to the action of the Legislature of West Virginia, even if we assume, which we do not, that the ratification of an Amendment to the Federal Constitution is "legislation" within the meaning of the rules of the Senate of that State governing its procedure in dealing with legislation before it. There is nothing in the general language of the rule in question to withdraw it from the effect of the principle that such rules only operate to prevent members of the House in which the measure upon which it has once acted originated, from again bringing the subject before it, but that they do

not prevent the consideration of the same subject matter when embodied in a Bill or Resolution coming from the other House. Cushing Law & Practice of Legislative Assemblies page 296. Nor can we agree that the two Resolutions offered respectively in the House and Senate were one measure, nor does the case of Smith vs. Mitchell, 69, W. Va., 481, 72 S. E. 756, support that contention. The facts of that case were these, a Bill had been read three times in the House of Delegates and sent to the Senate where it was substituted for a Bill identical with it in text which had been read there on two different days, and the substituted Bill was then read on another day in the Senate and passed. On objection that it was not read in the Senate on three different days, it was held not that the two measures were one, but that as they were identical in their text, and that as the identical text had been read on three different days in the Senate that the object and purpose of the provision requiring three readings was gratified. That is a different thing from holding that the act of one branch of the General Assembly will not be acted upon by the other because it has once acted on the same subject matter, or that two Bills originating in different Houses together constitute one measure.

Inasmuch as it appears that in addition to the 36 States already referred to as having ratified the 19th Amendment the State of Connecticut has also ratified it, it becomes unnecessary to consider at length the effect of the action of the Legislature of Tennessee in regard to it. In dealing with the question before it the Legislature was not bound by its rules or by its laws relating to legislation, because the ratification of an amendment to the Federal Constitution is "not an act of legislation within the proper sense of the word."

Hawke vs. Smith, No. 1 supra, and while it was essential that the ratification be approved by a majority of a quorum of each branch of the General Assembly, in this case that requirement was met, and it was not until that approval had once been given, that the attempt which resulted in so much confusion was made to recall it.

In view of the conclusion we have stated it is apparent that in our opinion no useful purpose could have been served by granting any of the appellant's prayers and without pausing to discuss further the propositions they submit it is sufficient to say that we have discovered no reversible error, in the Court's rulings in regard to them.

For the reasons stated the order appealed from will be affirmed.
Order affirmed with costs.

Filed June 28th, 1921.

Whereupon, Judgment was entered, as follows, to wit:

"1921, June 28th.—Order affirmed with costs."

Opinion filed.

Opinion by Offutt, J.

235

Petition.

In the Court of Appeals of Maryland, April Term, 1921.

OSCAR LESER and Others, Members of the Board of Managers of the Maryland League for State Defense, Appellants,

vs.

J. MERCER GARNETT and Others Constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City; Cecilia Streett Waters, Mary D. Randolph, and Caroline Roberts and others, Intervening as Defendants, Appellees.

To the Honorable A. Hunter Boyd, Chief Judge Court of Appeals of Maryland:

The Petition of Oscar Leser and others, Appellants in the above entitled case, respectfully shows unto your Honor:

1. That on the 28th day of June 1921, a Final judgment was duly entered by the Court of Appeals of Maryland affirming the judgment entered by the Court of Common Pleas in the matter of a Petition wherein said Oscar Leser and others, members of the Board of Managers of the Maryland League for State Defense were petitioners, and the said J. Mercer Garnett and others, constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City, and Cecilia Streett Waters and Mary D. Randolph, were defendants, and in the matter of which Petition Caroline Roberts and others, female citizens and residents of the State of Maryland, intervened by petition as parties defendants, which judgment of the Court of Common Pleas was rendered on the 28th day of January, 1921, dismissing the petition of the said Petitioners to have the names of the said defendants Cecilia Streett Waters and Mary D. Randolph struck from the registry of voters of the said precinct.

2. That the said Petitioners at the hearing of the said petition offered thirteen prayers for rulings by the Court of Common Pleas on questions of law arising thereon, which prayers are set forth in the fourth assignment of error filed herewith, and which prayers were each and all rejected by the Court of Common Pleas, and the Court of Appeals of Maryland by its said final judgment entered on the 28th day of June, 1921, affirmed the said action of the Court of Common Pleas in rejecting the said prayers, which action of the Court of Common Pleas upon the evidence before it, constituted the Petitioners' Bill of Exceptions in this case.

236

3. That the said prayers present the issues of law raised in the Court of Appeals, first, as to the validity of the alleged Nineteenth Amendment to the Constitution of the United States, disputed by the Petitioners as being in excess of the power to amend the Constitution conferred by Article V thereof and in violation of an express proviso or prohibition contained in Article V of the Constitution of the United States, and second, the validity of the ratification of the Legislatures of certain states which were certified as having ratified said Amendment, although in point of fact, as your Petitioners averred and offered evidence tending to prove, the said State Legislatures did not in fact or in law ratify the said amendment. That the said issues of law are founded on the Constitution of the United States, and the Petitioners aver that the action of the said defendants constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City, exercising authority under the State of Maryland, was repugnant to the Constitution of the United States in enforcing as a part thereof an alleged amendment, to wit, the alleged Nineteenth Amendment, which under the true construction of Article V of the said Constitution of the United States was not valid and was not duly ratified so as to become a part thereof.

4. That the judgment of the Court of Appeals of Maryland affirming the judgment of the Court of Common Pleas affirming the action of the said Board of Registry, gives effect in the State of Maryland to the said alleged Nineteenth Amendment as a part of the Constitution of the United States, although the same is not authorized to be adopted as a part of said Constitution by the provisions of Article V thereof or by any provision of said Constitution, and was not in fact duly ratified by a sufficient number of State Legislatures in the manner prescribed by said Article V of the United States Constitution.

5. That in the aforesaid judgment by the Court of Appeals of Maryland certain errors were committed to the prejudice of your Petitioners, all of which will more fully appear from the Assignment of Errors which is filed herewith.

Wherefore, Your Petitioners pray that a Writ of Error from the Supreme Court of the United States may issue in this case to the Court of Appeals of Maryland, the highest Court of the State of Maryland, wherein a decision in this case may be had, for the correction of Errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Appeals of Maryland may be sent to the Supreme Court of the United States as provided by law.

Dated the 14th day of September, 1921.

THOS. F. CADWALADER,
GEORGE ARNOLD FRICK,
WM. L. MARBURY,

Attorneys for Petitioners and Plaintiffs in Error.

Filed September 23rd, 1921.

238

Order of Court.

In the Court of Appeals of Maryland, April Term, 1921.

OSCAR LESER and Others, Members of the Board of Managers of the
Maryland League for State Defense, Appellants,

vs.

J. MERCER GARNETT and Others, Constituting the Board of Registry
of the Seventh Precinct of the Eleventh Ward of Baltimore City;
Cecilia Streett Waters, Mary D. Randolph, and Caroline Roberts
and Others, Intervening as Defendants, Appellees.

On reading of the Petition of Oscar Leser and others, for Writ of Error and the Assignment of Errors, and upon due consideration of the record of said cause; it is ordered, that a Writ of Error be allowed from the Supreme Court of the United States to the Court of Appeals of Maryland, the highest Court of the State of Maryland in which a decision can be had, as prayed for in said Petition, and that said Writ of Error and Citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said Petitioners and Plaintiffs in Error do give security in the sum of Five Hundred (\$500.00) Dollars, that the said Plaintiffs in Error shall prosecute said Writ of Error to effect, and, if said Plaintiffs in Error fail to make their Plea good, shall answer to the Defendants in Error for all costs and damages that may be adjudged or decreed on account of said Writ of Error.

And the said Plaintiffs in Error now presenting a Bond in the sum of Five Hundred (\$500.00) Dollars with United States Fidelity and Guaranty Company, as Security, it is ordered, that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 20th day of September, 1921.

A. HUNTER BOYD,
*Chief Judge of the Court of Appeals
of Maryland, the Highest Court of
the State of Maryland.*

Filed September 23rd, 1921.

Assignment of Errors.

In the Supreme Court of the United States.

OSCAR LESER et al., Plaintiffs in Error,

VS.

J. MERCER GARNETT et al., Defendants in Error.

Error to the Court of Appeals of Maryland.

Assignment of Errors.

Now come Oscar Leser, a citizen, voter and taxpayer of the City of Baltimore, State of Maryland, and others also citizens, voters and taxpayers of said State, Petitioners and Plaintiffs in Error, by George Arnold Frick and William L. Marbury, their attorneys, and show that in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals of Maryland, being the highest Court in the State of Maryland in which a decision could be had in the above entitled cause, manifest error has intervened to the prejudice of these Petitioners and Plaintiffs in Error in the particulars following, to wit:

1st. The Court of Appeals of Maryland erred in affirming by its judgment the action of the Court of Common Pleas in dismissing the petition of the Petitioners and Plaintiffs in Error.

2nd. The Court of Appeals of Maryland erred in deciding by its final judgment in this cause that the alleged Nineteenth Amendment to the Constitution of the United States is within the amending power conferred by Article V of the Constitution of the United States.

3rd. The Court of Appeals of Maryland erred in affirming by its final judgment in this cause, the action of the Court of Common Pleas in deciding that the alleged Nineteenth Amendment has been duly ratified by a sufficient number of State Legislatures to become valid as a part of the Constitution of the United States.

4th. The Court of Appeals of Maryland erred in affirming by its final judgment in this cause the action of the Court of Common Pleas in rejecting thirteen prayers offered by the Petitioners in said Court, praying for the ruling of said Court upon matters of law therein set forth, which thirteen prayers are in the words following, to wit:

Petitioners' First Prayer.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is not an amendment within the scope of the grant of power to amend contained in Article V of said Constitution.

Petitioners' Second Prayer.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is in conflict with the proviso contained in Article V of the Constitution of the United States.

Petitioners' Third Prayer.

The Court rules as matter of law that a State's suffrage in the Senate means the votes cast in the Senate by Senators elected in the State by the people thereof through Electors who possess the qualifications of Electors of the most numerous branch of the State's Legislature, which qualifications are prescribed and determined by the State in its Constitution or laws, and any purported amendment to the Federal Constitution which nullifies, substitutes or alters the qualifications of such Electors so prescribed and determined by the State, so as to confer the power of electing Senators upon persons on whom the State has not conferred it, or to deny, diminish or dilute such power in the persons upon whom the State has conferred it, operates to deprive the State of its suffrage in the Senate, and that the alleged Nineteenth Amendment would so operate.

Petitioners' Fourth Prayer.

The Court rules as matter of law that the consent of a State to such changes in the Federal Constitution as by the provisions of Article V require such consent, can only be expressed, whether directly or indirectly, through the voice of the majority of those persons upon whom it has conferred through its Constitution and laws the power to vote, and that any measure which confers such power upon other and different persons or denies, diminishes or dilutes such power in those upon whom the State has conferred it, deprives the State of its power by any means to consent to such changes or amendments, and is inconsistent with the proviso contained in Article V of the Constitution of the United States, and that the alleged Nineteenth Amendment is such a measure.

Petitioners' Fifth Prayer.

The Court rules as matter of law that if it find that under the provisions of the Constitution of Tennessee, offered in evidence the Legislature of Tennessee elected prior to the submission of the Nineteenth Amendment by the Congress to the Legislatures of the several States was without authority to act thereon (such being the law of Tennessee) then in determining whether such Amendment has been ratified by the Legislatures of three-fourths of the States any vote purported to have been given by the Legislature of Tennessee must be disregarded.

Petitioners' Sixth Prayer.

The Court rules as matter of law that if it shall find as a fact that by the law of Tennessee the entry upon the Journal of either House of its Legislature of a motion to reconsider the vote by which a bill or resolution was passed or failed of passage has the effect to suspend the operation of such vote until such motion has been acted upon, and if it shall further find that by said law the action of less than a quorum of either House, in acting upon such a motion to reconsider is a mere nullity, and if it shall further find that by said law where the Journal of the House offered in evidence shows that a motion to reconsider a vote by which a resolution to ratify the alleged Nineteenth Amendment of the Constitution of the United States was passed was subsequently adopted and the resolution reconsidered and upon such reconsideration such resolution failed of passage and was defeated by a majority of the votes in said House, a quorum being present, then the said resolution was not passed by the Legislature of Tennessee (such being the law of that State), then in determining whether said Amendment has been ratified by the Legislatures of three-fourths of the States the vote in favor of ratification so purported to have been given by the Legislature of Tennessee must be disregarded.

Petitioners' Seventh Prayer.

The Court rules as matter of law that if it shall find as a fact that by the law of West Virginia, when the Journals of either House of its Legislature being offered in evidence show in clear language that a resolution was defeated in such House and that a motion to reconsider the vote by which it was defeated was likewise defeated, and that under the rules of such House also offered in evidence the question so decided must stand as the judgment of that House and cannot during the session be drawn again into debate, then such resolution is not a resolution passed by the Legislature of West Virginia, notwithstanding without suspension of the rules the said House may have subsequently during the same session voted upon the same question, and notwithstanding such resolution should appear to have been signed by the presiding officers of both Houses and by the Chairmen of the respective Committees on enrolled bills, and to have been approved by the Governor, then (such being the law of the State of West Virginia) such resolution if it purport to ratify the alleged Nineteenth Amendment to the Constitution of the United States is without effect, and in determining whether such

242 Amendment has been ratified by the Legislatures of three-fourths of the States the vote so purported to have been given by the Legislature of West Virginia must be disregarded.

Petitioners' Eighth Prayer.

The Court rules as matter of law that if it find that under the provisions of the Constitution of Missouri offered in evidence any

resolution of the Legislature of that State purporting to ratify an amendment to the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of that State is without effect (such being the law of Missouri), then in determining whether such an amendment has been ratified by the Legislatures of three-fourths of the States any resolution in favor of such ratification that may have been passed by the Legislature of Missouri must be disregarded; and the Court further rules in the absence of any evidence of the construction placed by the Courts of Missouri on said provision of their State Constitution that the alleged Nineteenth Amendment is such an amendment as may impair the right of local self-government belonging to the people of Missouri.

Petitioners' Ninth Prayer.

The Court rules as matter of law that the grant of power to amend the Constitution of the United States contained in Article V is subject to the conditions under which the Constitution was originally adopted by the people of the United States, and that among such conditions are the express saving and reservation of powers in the States and the people as stated in the Ninth and Tenth Amendments whose adoption was by the people of the several States made a condition of their ratification of the Constitution, and that no power therefore exists against the consent of any State to adopt an Amendment in derogation of the powers so saved and reserved.

Petitioners' Tenth Prayer.

The Court rules as matter of law that the grant of power to amend the Constitution of the United States contained in Article V is subject to the express limitation contained in the provision of Article IV that the United States shall guarantee to every State a republican form of government, and that a republican form of government can only subsist where, under representative institutions, the people inhabiting the territory over which such government extends, enjoy the power to prescribe and determine what qualifications must be possessed by such of the said inhabitants as they may desire to clothe with the rights and duties of voters, and that a deprivation of such power is beyond the competency of any agency of the people of the United States, established by them in the same Constitution containing the aforementioned guaranty.

Petitioners' Eleventh Prayer.

The Court rules as matter of law that the power to amend the Constitution of the United States, granted by Article V, does not include the power to amend the Constitution of any State, if the last mentioned term be understood to mean such part of the formal instrument known as the Constitution of such State as establishes or defines its government or political structure.

243

Petitioners' Twelfth Prayer.

The Court rules as matter of law that the efficacy of the provisions of the 15th Amendment in all matters to which they are applicable, including the election of United States Senators, cannot be disputed, but the effect of said Amendment as a precedent in Constitutional law to determine the validity of other measures subsequently proposed and ratified without the consent of this State, even though couched in similar language, may be deemed to be circumscribed by the historical facts relating to the purpose underlying said 15th Amendment and the objects sought to be accomplished at the time of its proposal, as well as by the historical facts relating to the methods by which and the conditions under which its formal proposal and ratification, as duly proclaimed by the Secretary of State, had been accomplished or secured, including such elements of compulsion of force as history relates in the premises, and also the historical facts as to whatever element of vis major may have led to the silent acquiescence in its validity upon the part of such States, or the people thereof, as had not consented to its ratification.

Petitioners' Thirteenth Prayer.

The Court rules that the certificates put in evidence by the respondents purporting to certify to the ratification of the Federal Suffrage Amendment by the legislatures of the States of West Virginia and Tennessee, do not comply with the requirements of Section 205 of the U. S. Revised Statutes in that they do not certify that said amendment was adopted by said respective legislatures "according to the provisions of the Constitution of the United States, and the Court rules that said certificates are of no virtue or effect in forming the basis or justification of the proclamation of the Secretary of State of the United States, and that said proclamation was therefore irregular and invalid.

By reason whereof these Petitioners, and Plaintiffs in Error, pray that the said judgment of the Court of Appeals of Maryland may be reversed, annulled and held for nothing.

Dated the 14- day of September, 1921.

GEORGE ARNOLD FRICK,
WM. L. MARBURY,

Attorneys for Oscar Leser and Others, Plaintiffs in Error.

Filed September 23rd, 1921.

244

Bond With Approval Thereon.

Know all men by these presents, That we, Oscar Leser (acting on his own behalf and on behalf of all his co-plaintiffs in error in the cause hereinafter mentioned) individually, as principal, and United States Fidelity and Guaranty Company, a corporation, as sureties, are held and firmly bound unto J. Mercer Garnett, Frederick W. Beck, William J. Hogan and Daniel Billmyer, constituting the

Board of Registry of the 7th precinct of the 11th Ward of Baltimore City, Cecilia Streett Waters, Mary D. Randolph, and Caroline Roberts and others intervening by petition as defendants, defendants in error, in the full and just sum of Five hundred (\$500.) dollars, to be paid to the said J. Mercer Garnett and others, defendants in error, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of September, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a Court of Appeals of the State of Maryland in a suit depending in said Court, between Oscar Leser and others, members of the Board of Managers of the Maryland League for State Defence, Appellants, and J. Mercer Garnett and others constituting the Board of Registry of the 7th precinct of the 11th Ward of Baltimore City, Cecilia Streett Waters, Mary D. Randolph, and Caroline Roberts and others intervening by petition below as defendants, Appellees, a judgment was rendered against the said Oscar Leser and others, appellants, and the said Oscar Leser and others, appellants in said Court of Appeals of Maryland, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. Mercer Garnett and others, appellees in said Court of Appeals of Maryland, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

244½ Now, the condition of the above obligation is such, That if the said Oscar Leser and others, plaintiffs in error, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

OSCAR LESER. [SEAL.]

UNITED STATES FIDELITY &
GUARANTY CO.,

R. HOWARD BLAND, [SEAL.]

Vice Pres.;

WILLIAM J. McFEELY, [SEAL.]

Asst. Secretary.

Sealed and delivered in presence of—

THOS. F. CADWALADER,

(As to O. L.)

ALBERT H. BUCK,

As to Surety.

Approved by—

A. HUNTER BOYD,

*Chief Judge of the Court of
Appeals of Maryland.*

September 20, 1921.

Filed September 23rd, 1921.

245 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Maryland before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Oscar Leser, Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hemsley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, William E. P. Wyse, Appellants, and J. Mercer Garnett, Frederick W. Beck, William J. Hogan, and Daniel Billmeyer, constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of the City of Baltimore, Cecilia Streett Waters, Mary D. Randolph, Defendants, and Caroline Roberts, Clara T. Waite, Josephine L. Chatard, Eugenia H. Parker, Madeline Le Moyne Ellicott, A. Page Reid, Margaret T. Carey, Anna W. Heath, Evelyn P. Lord, Annie Janney, Mary W. Ramey, and Hattie M. Emmert, intervening as defendants, Appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Oscar Leser, Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hemsley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, William E. P. Wyse, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the twentieth day of September, in the year of our Lord one thousand nine hundred and twenty one.

[Seal of United States District Court, Maryland.]

ARTHUR L. SPAMER,
*Clerk of the District Court of the
United States for the District of
Maryland.*

Allowed by

A. HUNTER BOYD,

*Chief Judge of the Court of Appeals
Maryland.*

[Endorsed:] Supreme Court of the United States, October Term, 191—. Oscar Leser et al. vs. J. Mercer Garnett et al. Writ of error.

247 UNITED STATES OF AMERICA, *vs.*

To J. Mercer Garnett, Frederick W. Beck, William J. Hogan, and Daniel Billmyer, constituting the Board of Registry of the Seventh Precinct of the Eleventh Ward of the City of Baltimore; Cecilia Streett Waters, Mary D. Randolph, Defendants, and Caroline Roberts, Clara T. Waite, Josephine L. Chatard, Eugenia H. Parker, Madeline Le Moyne Ellicott, A. Page Reid, Margaret T. Carey, Anna W. Heath, Evelyn P. Lord, Annie Janney, Mary W. Ramey, and Hattie M. Emmart, intervening as defendants, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Maryland, wherein Oscar Leser, Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hensley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, and William P. E. Wyse are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of the State of Maryland, this twentieth day of September, in the year of our Lord one thousand nine hundred and twenty-one.

A. HUNTER BOYD,
*Chief Judge of the Court of
Appeals of the State of Maryland.*

248 On this 22nd day of September, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared Thomas F. Cadwalader before me, the subscriber, a Notary Public of the State of Maryland duly commissioned and qualified to act in and for Baltimore City and makes oath that he delivered a true copy of the within citation to Cecilia Streett Waters, at her residence, No. 824 North Eutaw Street, in the City of Baltimore, and that he took a true copy thereof also to the given address in said city of Mary D. Randolph, (col.), No. 331 West Riddle St, but said Mary D. Randolph was not found, having moved away, and her present address is unknown.

Sworn to and subscribed the twenty-second day of September, A. D. 1921.

[Seal of Margaret K. Schaffer, Notary Public, Baltimore, Md.]

MARGARET K. SCHAFER,
Notary Public.

Service of copy of the within citation admitted, this 22nd day of September A. D. 1921.

ALEXANDER ARMSTRONG,
*Attorney General of Maryland, Attorney
for J. Mercer Garnett et al., Members of
Board of Registry of 7th Pct. of 11th
Ward of Baltimore City.*

GEO. M. BRADY,

ROYCE HOWELL,

JACOB M. MOSES,

*Attorneys for Caroline Roberts et al., In-
tervening Petitioners, as Defendants
Below and Appellers in Court of Ap-
peals of Maryland*

249

Appellants' Costs.

Record	\$330.00
Briefs	336.00
Appearance fee	10.00
Clerk	2.40
	<hr/>
	\$678.40

Appellees' Costs.

Brief	\$41.00
Appearance fee	10.00
Clerk	1.45
	<hr/>
	\$52.45

Cost of Record \$64.00.

250 STATE OF MARYLAND, *set*:

I, C. C. Magruder, Clerk of the Court of Appeals of the State of Maryland do hereby certify that the said Court is the highest Court of Law and Equity in said State in which a decision can be had.

I further certify that the foregoing is a true transcript of record, opinion of the Court and judgment entered thereon, petition for writ of error, assignment of errors and order of Court thereon, and Bond with approval thereon endorsed, in the case there stated.

And in obedience to the commands of the within writ I now transmit said transcript of record together with the original writ of error and the original citation in said cause, to the Supreme Court of the United States.

In Testimony Whereof I hereunto subscribe my name and the seal of the Court of Appeals of Maryland affix this twenty-fourth day of September, A. D. 1921.

[Seal of Court of Appeals, Maryland.]

C. C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

Endorsed on cover: File 28,508, Maryland Court of Appeals. Term No. 553. Oscar Leser, Eugene H. Beer, Harry M. Benzinger, et al., plaintiffs in error, vs. J. Mercer Garnett, Frederick W. Beck, William J. Hogan, et al., &c., et al. Filed September 26th, 1921. File No. 28,508.



FILED

DEC 18 1921

WM. H. STANFORD

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,

PLAINTIFFS IN ERROR,

against

J. MERCER GARNETT, ET AL.,

DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR HABEAS CORPUS TO THE COURT
OF APPEALS OF MARYLAND.

BRIEF FOR PLAINTIFFS IN ERROR.

THOMAS F. CADWALADER,

GEORGE ARNOLD FRICK,

WILLIAM L. MARBURY,

For Plaintiffs in Error.

ANALYTICAL INDEX.

	PAGE
STATEMENT OF THE CASE.....	1
1. THE PETITION.....	1
2. THE MARYLAND CONSTITUTION.....	2
3. REPUGNANCY OF ACTION OF STATE AUTHORITIES TO CONSTITUTION OF UNITED STATES.....	2-3
4. AMENDMENT REJECTED BY MARYLAND.....	3
5. PROCEDURE UPON PETITION.....	4
6. THE FACTS SHOWN.....	5-16
I. Nature of the Evidence.....	5
II. Petitioners' Evidence.....	6-14
1. Constitution of West Virginia.....	7
2. Constitution of Tennessee (Rules, etc.).....	7
3. Constitution of Tennessee (Limitation).....	7
4. Constitution of Missouri (Limitation).....	7
5. Constitutions of All Ratifying States How Amendable	8
6. Proceedings in Tennessee Legislature.....	8-9
7. Proceedings in West Virginia Legislature.....	9-11
8. Law of West Virginia Upon Authentication of Legislative Acts.....	11-13
9. Law of Tennessee Upon Authentication of Leg- islative Acts.....	13-14
10. Refusal of Secretary of State of United States to Question Verity of "Official Notice".....	14
III. Defendants' Evidence.....	14-16
1. Proclamation of Ratification.....	14-15
2. Certificate to State Department from West Vir- ginia	15
3. Certificate from Governor of Tennessee.....	15
4. Certificate from Secretary of State of Connecti- cut	16
IV. Rebuttal	16
Further Certificate to State Department from Gov- ernor of Tennessee.....	16
7. PROPOSITIONS OF LAW BELOW.....	16

SPECIFICATION OF ERRORS	16-20
Nos. 1- 5, Relating to Validity	17-18
Nos. 6-15, Relating to Ratification	18-20
Nos. 16-17, Relating to Refusal of All Prayers.....	20

ARGUMENT	20
-----------------------	----

I. THE NINETEENTH AMENDMENT INVALID AS EXCEEDING LIMITS OF POWER TO AMEND DELEGATED IN ARTICLE V	20-100
1. THE IMPLIED LIMITS EXCEEDED	21-49
a. No Decision Denies Doctrine of Implied Limits.....	21-22
b. History Sustains the Doctrine.....	22-31
i. Legislatures, Even of Three-fourths of States, Never Supreme.....	22-27
ii. Conventions, Even of Three-fourths of States, Never Supreme Over People of Other States.....	28-31
iii. Sovereignty of People Exercised Concurrently by States	31
c. Analogy Sustains the Doctrine.....	32-39
i. Limits of Taring Power.....	32-34
ii. No Unlimited Power Granted by Constitution....	34-36
iii. Limits Implied from Necessity.....	36-37
iv. Similar Necessity Limits Other Constitutional Powers	37-39
d. Reason Sustains the Doctrine.....	39-47
i. State Sovereignty Inherent, Not Permissive.....	39-40
ii. Popular Sovereignty in England Distinguished...	41
iii. Irresponsibility of Amending Power Applied to Suffrage	41-42
iv. Indestructibility of States One of Purposes of Constitution	43-44
v. Rule of Construction That Accomplishes Purpose of Instrument Obligatory.....	44-47
e. Summary	48-49
2. EXPRESS LIMITS OF THE AMENDING POWER	49-73
a. History of the Proviso (See Appendix).....	49-51
b. History of the Suffrage in the Senate and the House...	52-57
c. Contemporary Criticism of the Plan.....	57-64
d. Meaning of Proviso as Applied to Plan.....	64-69
e. Examples of Proposed Violations of Proviso.....	69-71
f. State Must Be Capable of Consenting.....	71
g. Election of Senators Committed to States.....	72
3. THE NINETEENTH AMENDMENT VIOLATES THE PROVISIO AND SO EXCEEDS EXPRESS LIMITS OF AMENDING POWER	73-85

I. Effect of the Amendment.....	73-75
II. Operation of an Amendment Restricting Suffrage....	75-76
III. Operation of an Amendment Enlarging or Conferring Suffrage	76-77
IV. Settled Law of Corporations Forbids Enlarging Suffrage Against the Corporate Will.....	78-82
V. Summary	82-85
PETITIONERS' 2ND, 3RD AND 4TH PRAYERS.....	84
4. THE FIFTEENTH AMENDMENT AND DECISIONS THEREUNDER DO NOT GOVERN THIS CASE.....	85-100
a. Consent Has Validated 15th Amendment.....	85-90
b. Conditions of Reconstruction After Civil War Removed Question of Consent from Realm of Judicial Decision..	90-92
c. Example in Creation of West Virginia.....	92-93
d. Violence No Substitute Method of Amending Constitution, But Its Effects Not Subject to Judicial Inquiry...	93
e. Essential Difference Between Race and Sex Discrimination	94-100
i. Race Problems National in Scope.....	94-96
ii. Sex Discrimination Not a National Problem.....	96
iii. Nineteenth Amendment Forbids Natural Distinctions Common to Every Code.....	97-98
iv. Summary	98-100
II. THE NINETEENTH AMENDMENT HAS NOT BEEN RATIFIED, NOT HAVING RECEIVED THE ASSENT OF THREE-FOURTHS OF THE STATES.....	100-117
1. Tennessee and West Virginia in Fact Rejected the Amendment	100-102
2. The Legislatures of Five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, Were Incompetent to Ratify This Amendment and Their Ratifications Are Void.	102-117
a. EXTENT OF THE POWERS OF LEGISLATURES.....	103-104
b. HAWKE VS. SMITH DISCUSSED.....	105-107
c. RESTRICTIONS ON LEGISLATURES OF THE FIVE STATES...	107-110
d. LEGISLATURES ARE AGENTS OF STATES, NOT OF NATION..	111
e. NO MASS SOVEREIGNTY ABOVE PEOPLE OF THE STATES...	111-114
f. SOVEREIGNTY NOT TRANSFERRED TO AGENTS OF THE PEOPLE	115-117
g. CONCLUSION	117
III. CONCLUSION	117-119
APPENDIX A.....	i-iv

TABLE OF CASES.

Allen vs. McKeen, 1 Sumn. 276.....	80
Brewer vs. Huntington, 86 Tenn. 732.....	13, 100
Brown vs. Hummel, 6 Pa. St. 86.....	80
Bryan vs. Board of Education, 151 U. S. 639.....	80
Citizens' Sec. & Land Co. vs. Uhler, 48 Md. 455.....	47
Civil Rights Cases, 100 U. S. 3.....	37
Cohens vs. Virginia, 6 Wheat. 264.....	22, 29, 60, 106
Collector vs. Day, 11 Wall. 113.....	33, 34, 35, 118
Dartmouth College vs. Woodward, 4 Wheat. 518.....	78, 80
Dillon vs. Gloss, 41 S. C. Rep. 510.....	85
Dodge vs. Woolsey, 18 How. 331.....	85
Evans vs. Gore, 253 U. S. 245.....	36
Guinn vs. U. S., 238 U. S. 347.....	74, 75, 83, 87, 97
Haire vs. Rice, 204 U. S. 291.....	107
Hawke vs. Smith, 253 U. S. 221.....	105
Kansas vs. Colorado, 206 U. S. 46.....	69
Lane County vs. Oregon, 7 Wall. 71.....	34, 76
Legal Tender Cases, 12 Wall. 457.....	45
Livermore vs. Waite, 102 Calif. 113.....	47
Loan Association vs. Topeka, 20 Wall. 655.....	34
Luther vs. Borden, 7 How. 1.....	76, 92, 118
McCulloch vs. Maryland, 4 Wheat. 316.....	23, 24, 29, 58, 97, 103, 113
Myers vs. Anderson, 238 U. S. 368.....	73, 86, 87, 89
National Prohibition Cases, 253 U. S. 350.....	21
Neri vs. Delaware, 103 U. S. 370.....	87
Ohio vs. Neff, 52 Ohio St. 375.....	80, 81
Osborne vs. Staley, 5 W. Va. 85.....	11, 100
Regents vs. Williams, 9 Gil & Johns. 365.....	80, 81
Rhode Island vs. Palmer, 253 U. S. 350.....	21
Sage vs. Dillard, 15 B. Monroe 340.....	80, 81
Shields vs. Ohio, 95 U. S. 324.....	47
Sinking Fund Cases, 99 U. S. 700.....	47
Slaughter House Cases, 16 Wall. 36.....	38
Smith vs. Mitchell, 60 W. Va. 481.....	11, 100
State vs. Algood, 87 Tenn. 163.....	13, 14, 100
State vs. Hubbard, 148 Ala. 391.....	45
Strander vs. West Virginia, 100 U. S. 303.....	96
Sturges vs. Crowninshield, 4 Wheat. 193.....	39
Texas vs. White, 7 Wall. 700.....	43, 76
United States vs. Mosley, 238 U. S. 383.....	87
United States vs. Reese, 92 U. S. 214.....	87
Webb vs. Carter, 129 Tenn. 182.....	13, 14, 100
White vs. Hart, 13 Wall. 646.....	44
Yerger, Ex Parte, 8 Wall. 85.....	45
Zabriskie vs. Hackensack, 18 N. J. Eq. 178.....	47

CONSTITUTIONS AND STATUTES.

UNITED STATES CONSTITUTION—

Preamble	31, 72
Article I, Sec. 1.	68
Article I, Sec. 2.	112
Article I, Sec. 4.	64
Article I, Sec. 8.	32
Article I, Sec. 10.	78, 80
Article IV, Sec. 4.	118
Article V.	<i>passim</i>
Article VII.	28
Amendments—	
Article XIII.	37
Article XIV.	37, 38, 78, 80, 96, 98
Article XV.	73, 74, 85 et seq., 94 et seq.
Article XVI.	37, 87
Article XVII.	62, 72, 73
Article XVIII.	21
Statutes—	
Judicial Code, Sec. 237.	5
R. S. 5508, etc.	87

MARYLAND CONSTITUTION—

Article I, Secs. 1, 2, 3.	2
Article III, Sec. 57.	46
Declaration of Rights, Articles 2 and 4.	2
Acts, 1716, Ch. 11.	27

MISSOURI CONSTITUTION—

Article 2, Sec. 3.	7, 103, 108
----------------------------	-------------

RHODE ISLAND CONSTITUTION—

Article I.	103, 109
--------------------	----------

TENNESSEE CONSTITUTION—

Article II, Sec. 11.	7
Article II, Sec. 32.	7, 103, 108

TEXAS CONSTITUTION—

Article I, Secs. 1, 29.	103, 108
---------------------------------	----------

WEST VIRGINIA CONSTITUTION—

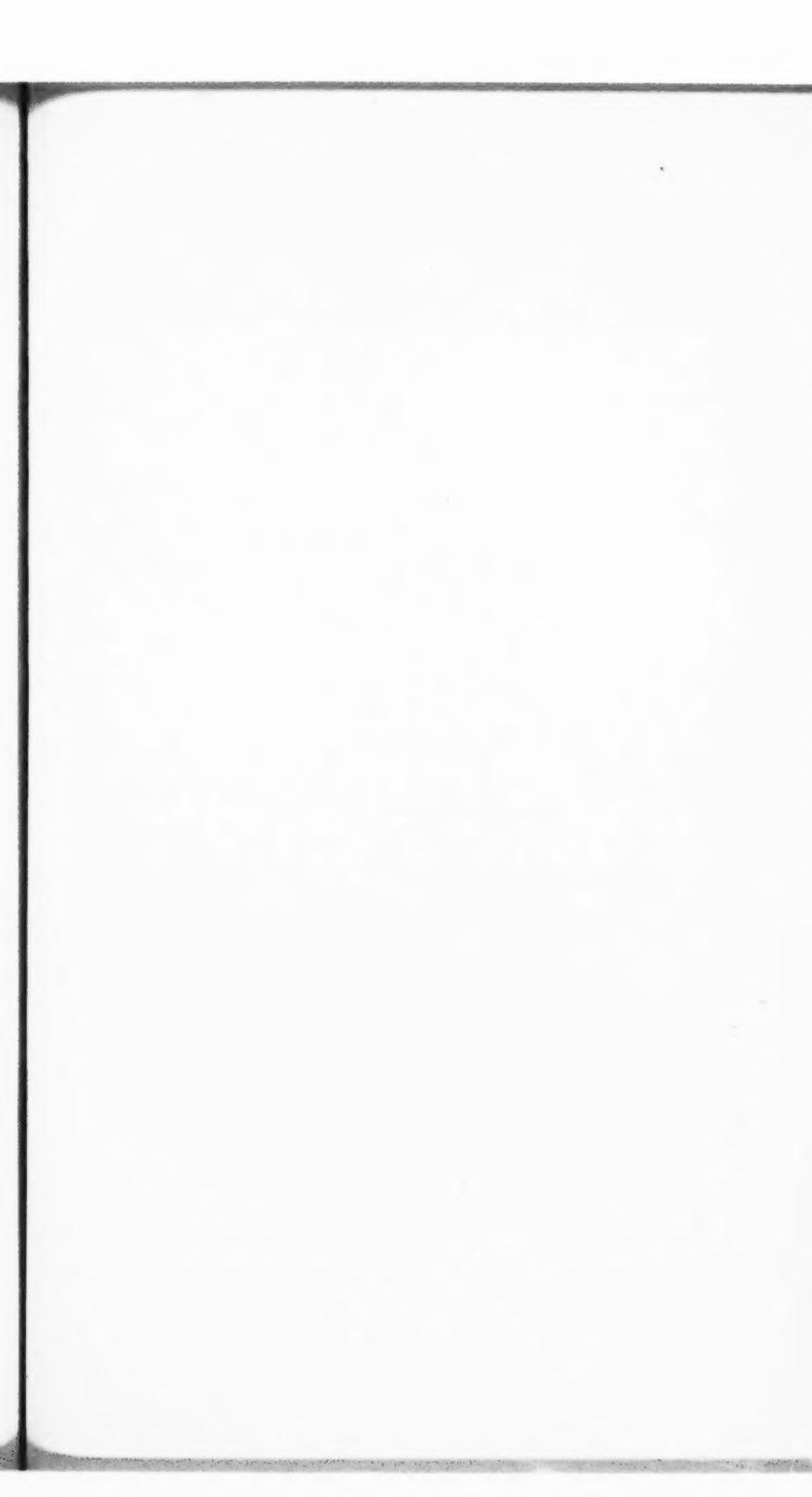
Article I, Sec. 2.	103, 109
Article VI, Sec. 24.	7

WORKS OF REFERENCE.

Blaine, James G., "Twenty Years of Congress".....	93
Curt's, Geo. T., "History of the Constitution".....	65-67
"Federalist"	60, 67, 82
Guizot, "Hist. de l'Origine du Gouv. Rep.".....	35
Munro, W. B., "The Government of the United States".....	90
Scott, A. W., in Harvard Law Rev.....	80
Watterson, Henry, "Marse Henry".....	90
Webster, Daniel, in "Congressional Debates".....	116
Webster, Daniel, in <i>Luther vs. Borden</i>	76

FOUNDERS OF CONSTITUTION.

Brearly, David.....	App. A
Butler, Pierce.....	55
Dickinson, John.....	52, 54, 56, 61
Ellsworth, Oliver.....	55, 62
Franklin, Benjamin.....	55
Gerry, Elbridge.....	App. A
Hamilton, Alexander.....	53, 67, 83
Iredell, James.....	63
Johnson, William Samuel.....	61
Lansing, John.....	51, 53
Lee, Henry.....	113
Madison, James.....	24, 51, 62, 67, 72, 83, 104, 113, App. A
Martin, Luther.....	51, 52, 53, 58, 59, 60, 61, 62
Mason, George.....	55, 104, App. A
Morris, Gouverneur.....	55, App. A
Paterson, William.....	61
Pinckney, Charles.....	57, 63, 72, 113, App. A
Pinckney, Charles Cotesworth.....	63
Randolph, Edmund.....	App. A
Read, George.....	52, 61
Rutledge, John.....	50, 55, App. A
Sherman, Roger.....	30, 51, App. A
Willson, James.....	54, 55
Yates, Robert.....	51, 53





In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,
against
J. MERCER GARNETT, ET AL.,

DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

1. THE PETITION.

This case arises upon a petition authorized under the Maryland statutes filed in the Court of Common Pleas, a court of record sitting in the City of Baltimore, by a number of the citizens, voters and taxpayers of the State of Maryland, praying that the names of two women, registered over the protest and challenge of one of the petitioners as qualified voters in the 7th precinct of the 11th ward of said city, be struck from the registry on the

ground that being women they were not qualified to vote under the law of the land (Rec., p. 1).

2. THE MARYLAND CONSTITUTION.

The Constitution of Maryland limits the right of suffrage to adult male citizens of sound mind, not convicted of larceny or other infamous crime or bribery of voters or illegal voting, and possessing certain qualifications as to residence, which, at the time of filing the petition, it is conceded that the two women challenged, Cecilia Streett Waters, a white woman, and Mary D. Randolph, a colored woman, both possessed (Const. Md., Art. I, Sees. 1, 2, 3).

The Maryland Constitution adopted in 1867 contains in its Declarations of Rights the following:

Article 2. The Constitution of the United States, and the laws made or which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, are and shall be the supreme law of the State; and the judges of this State, and all the people of this State, are and shall be bound thereby, anything in the Constitution or law of this State to the contrary notwithstanding.

Article 4. That the people of this State have the sole and exclusive right of regulating the internal government and police thereof as a free, sovereign and independent State.

3. REPUGNANCY OF THE ACTION OF STATE AUTHORITIES TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners averred that the so-called 19th Amendment to the United States Constitution under and pursuant to which alone the defendant board of registry claimed the right to register the said women was not at the time of said registration (October 12, 1920), and is

not now a part of the Constitution or of the law of the State, but that both it and the action of the board in enforcing it are contrary to the Constitution of the United States, and hence of no validity.

The reasons for this repugnance are as follows:

1. The Amendment not only is beyond the general scope of the grant of power to amend contained in Article V of the Federal Constitution, but also it operates to deprive the State of Maryland of its suffrage in the Senate without its consent, and to prevent said State from even giving or refusing its consent thereto, or to other amendments, and hence is excluded by the proviso in Article V from the scope of said grant, at least as to any non-consenting State.

2. The Amendment was not lawfully ratified by the Legislatures of three-fourths of the States as provided in Article V, and hence was not and is not a part of the Constitution, and it is therefore contrary to the Constitution to enforce it as such.

4. AMENDMENT REJECTED BY MARYLAND.

The General Assembly of Maryland at its regular session of January, 1920, refused to ratify said amendment, and rejected it as an amendment unauthorized under Article V and repugnant to the spirit and purposes of the Federal Constitution in that it destroyed the right of self-government belonging to the people of Maryland which the Constitution was ordained to preserve and perpetuate.

The resolution of rejection appears in the Record (pp. 8, 10).

5. PROCEDURE UPON THE PETITION.

The Court of Common Pleas after a full trial dismissed the petition. An appeal was taken to the Court of Appeals of Maryland, the highest Court in the State, and the defendants there raised again, as they had done below, the question of the jurisdiction under the Maryland statutes to decide the matter and of the legality of the procedure adopted. Both the jurisdiction and procedure were sustained by the Court of Appeals (Record, pp. 149, 151), as they had been below, and a decision rendered to the effect, first, that the Amendment was indistinguishable in principle from the 15th Amendment, and that as this Court had, as they found, in effect sustained the validity of the latter as being authorized under Article V, that question was no longer open, and, secondly, that upon due consideration of the Record the votes of Missoari and West Virginia were lawfully given and counted in the affirmative and whether that of Tennessee was so given or not was unnecessary to be decided because it appeared that Connecticut had subsequently ratified, making a total of 36 states irrespective of Tennessee (Record, pp. 156, 160).

The petitioners, now plaintiffs in error, prosecuted a writ of error to bring the Record before this Court, on the ground that the action of the State authorities, i. e., the Board of Registry, in giving effect to a measure as a part of the Constitution of the United States and hence of the supreme law of the land, within the State of Maryland, which by the proper construction of Article V and the other articles of the Constitution could not have been validly adopted, at least without unanimous consent of the States, and which in fact was not validly adopted by the Legislatures of 36, or three-fourths of the States, as required by Article V, was an act repugnant to Article V and to the whole Constitution.

Out of abundant caution, as the jurisdiction of this Court upon writ of error was questioned by defendants in error, plaintiffs in error also submitted a petition for the issuance of the writ of certiorari, concerning the right to grant which writ in this case there has been and can be no question.

(Judicial Code, Sec. 237, as amended by Act approved September 6, 1916, 39 St. 726).

6. THE FACTS SHOWN.

I. Nature of the Evidence.

At the trial in the Court of Common Pleas it was stipulated that certain printed and documentary evidence might be offered without more formal proof to show, (1) the provisions of the Constitutions of other States, (2) the law of such States as evidenced by the decisions of their courts of last resort, (3) the contents of the Senate and House Journals of the West Virginia Legislature, at the extraordinary session of 1920,—reservation being made of the right to object to the admissibility of such evidence as irrelevant.

In addition, both sides offered certified transcripts of the Journals of the Senate and House of Representatives of Tennessee, so far as they affected questions of ratification or failure to ratify the Suffrage Amendment. These transcripts differed in that the transcript first offered by Petitioners (pp. 29-86), certified by the clerks of the two Houses and the Secretary of State of Tennessee, on October 27, 1920, purports to be a complete record of all action taken at the session, the transcript offered by Defendants (pp. 113-129) purports to contain only such part of the proceedings as the Governor of Tennessee saw fit to transmit to the Secretary of State of the United States on August 24, 1920, accompanying his certification bearing that date (p. 114), and the tran-

script offered in rebuttal by Petitioners (pp. 131-142), purports to contain the proceedings of the Tennessee House from August 31st to September 2nd, inclusive, as transmitted to the Secretary of State of the United States, at the request of the House, by the Governor, on September 3rd, 1920.

There is no discrepancy between either of the transcripts offered by Petitioners, but the transcript offered by Defendants contains much matter that in the Petitioners' complete transcript appears as having been expunged by the House, and also there is a discrepancy between the record of the same vote, upon the motion to reconsider, in the expunged portion of the Petitioners' transcript (p. 39) (reappearing as part of a message from the House in the Senate Journal, at p. 77), and in the Defendants' transcript (p. 128). In the former it appears that on a motion to reconsider the vote of ratification, 58 members being present, and 66 constituting a quorum, under the Tennessee Constitution, and the Speaker having ruled the motion to reconsider out of order for lack of a quorum (p. 37), and being overruled on appeal (p. 38), the motion to reconsider the vote in favour of the resolution of ratification (pp. 33-34) failed by the vote of *49 noes to 9 ayes*. In the Defendants' transcript this vote is totalled as *50 noes to 9 ayes* (p. 128), though the appended list of voters contains only *48 names of those voting no*.

The total membership of the House is 99.

II. Petitioners' Evidence.

The material parts of the evidence offered by the Petitioners under the aforesaid stipulation or otherwise, over the objections of the Defendants as to relevancy, establishes the following facts (omitting all reference to the procedural steps under the law of Maryland, which

the Court of Appeals of that State has held sufficient to confer jurisdiction of the issues on the Court):

1. That the Constitution of West Virginia requires that "each House shall determine the rules of its proceedings" (p. 27).

2. That the Constitution of Tennessee contains the same provision and also fixes the number 66 as a quorum of the House (pp. 27-8).

3. That the Constitution of Tennessee contains the following:

"Article II, Section 32. Amendment to Constitution of the United States:

No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such convention or general assembly shall have been elected after such amendment is submitted" (p. 27).

It appears in evidence (pp. 54, 65) and is conceded (p. 157), that the General Assembly which acted on the amendment had been elected *before* the amendment was submitted or proposed by Congress.

4. That the Constitution of Missouri contains the following:

"Article 2, Section 3. Local self-government not to be impaired. That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible union, and were intended to co-exist with it, the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment or change of the Con-

stitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State" (p. 28).

5. That all the States which have gone through the form of ratifying the amendment or are claimed to have done so, are governed under written State Constitutions whose own amendment in each case requires ratification by the vote of their own qualified electors (p. 28).

6. That the Legislature of Tennessee met at the call of the Governor in extraordinary session on August 9, 1920. That a resolution of ratification of the proposed suffrage amendment was passed by the Senate on August 13th (p. 67). That on August 18th this resolution came up for consideration in the House of Representatives and a motion to table the same failed by a tie vote of 48 to 48 (p. 33). That on the same day the resolution was concurred in by the vote of 50 to 46 (p. 34), including Mr. Speaker Walker in the majority, he having changed his vote from "no" to "aye," and entering on the journal a motion to reconsider (p. 36). That on Aug. 21st, in a House with only 58 members present, the motion to reconsider was brought up, but ruled out of order by the speaker, owing to the absence of a quorum, but the members present, on appeal from that decision, overruled it, and by a vote of 49 to 9 defeated the motion (p. 39). That on August 31st, 91 members being present (p. 40), by a vote of 47 to 37, with 6 present and not voting, expunged from the journal all proceedings of the House on the 21st when no quorum was present except the rolleall showing no quorum to be present and the points of order made and the rulings thereon, and therefore expunged the record of the above attempted defeat of the motion to reconsider (pp. 40-42). That on the same day, August 31st, the House then by vote "supplied," i. e., produced a copy of the Resolution of Rati-

fication, which the quorumless body had previously sent back to the Senate, called up the motion to reconsider the vote by which it had been passed on the 18th, and passed the motion to reconsider, without a division (pp. 43-44). That immediately thereafter, by a vote of 47 to 24, with 20 present and not voting, the House "non-concurred" in the Resolution of Ratification. That the House then directed its clerk to notify the Senate of its non-concurrence (p. 46).

That the Senate refused to accept the message of non-concurrence by the House and returned it, but the House insisted, and the Senate subsequently received the same "without undertaking to determine the validity or invalidity of the action of the House," and "out of courtesy and deference" to that body (pp. 47, 81, 82).

That the Governor of Tennessee afterwards, on the 3rd day of September, 1920, at the request of the House, transmitted to the Secretary of State of the United States a transcript of all entries on the House Journal for August 31st and subsequent days, containing the resolution expunging the matter referred to, the adoption of the motion to reconsider and the vote of "non-concurrence" in the Senate Resolution of Ratification (pp. 131-142).

7. That the Legislature of West Virginia met at the call of the Governor in extraordinary session on February 27, 1920. That on March 1st a resolution introduced in the Senate to ratify the amendment was defeated by a vote of 15 to 13, two members being absent (p. 89). Mr. Harmer had changed his vote from "aye" to "no" in order to move to reconsider (p. 90), which motion he made upon March 3rd (p. 93). The motion to reconsider was then voted on and after efforts to delay the announcement of the final result had failed,

the vote was announced as 14 to 14, defeating reconsideration (p. 96).

That on March 3, 1920, the House adopted a resolution of ratification (p. 105), practically *in totidem verbis* with the resolution which the Senate had defeated.

That on March 8, 1920, a message from the House received by the Senate announced the adoption of the House resolution and requested the Senate's concurrence (p. 97). That on March 10th the House resolution "coming up in regular order for consideration was read by the clerk" (p. 100), and on the question, "Shall the resolution be adopted?" Mr. Gribble made a point of order based on the following Senate Rule (p. 100. Rule on pp. 97 and 106):

"Rule 52. The question being once determined must stand as the judgment of the Senate, and cannot during the session, be drawn again into debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding business days."

The point of order was debated (p. 100) and the President of the Senate stated (p. 101) that he had studied the question and consulted lawyers, and that "it has placed me in such a position that I hardly know what to do; so I have determined instead of deciding this point of order myself, to submit it to the vote of the Senate and ask them to express just what they believe in the matter. I am therefore going to ask the clerk to call the roll, upon what the rule is."

Objection was immediately made to the president's refusal to rule on the point of order, and those passages of "Reed's Rules of Order" which formed a part of the Rules of Procedure of the Senate (Rules 183 and 184,

p. 106) were quoted to the chair, providing that when a point of order is made it is to be decided by the chair subject to appeal. Nevertheless the chair persisted in refusing to rule and directed the clerk to call the roll (p. 102), whereupon on the point of order there were 14 ayes and 15 noes, including the president among the noes.

The rolleall on the resolution then followed, showing 16 ayes and 13 noes, Mr. Gribble having changed his vote from "no" to "aye" in order to move to reconsider. Another member, however, made the motion immediately and it was defeated. An order was then passed to communicate to the House the adoption of the resolution by the Senate (p. 102).

S. That by the law of West Virginia, as evidenced by the decisions of its Supreme Court of Appeals, in *Osborne vs. Staley*, 5 W. Va. 85, the only final evidence of whether a bill has passed the Legislature (if the fact of its passage is disputed) is in the journals of the Houses. This evidence is held to be superior to that of the authentication of the act (p. 107).

Also that by the law of West Virginia, evidenced by the decision of the same Court in *Smith vs. Mitchell*, 69 W. Va. 481, where a constitutional provision requiring that a bill should have three readings on different days in each House was under consideration, and an act was challenged as never having been passed for lack of such readings, and it appeared that the same measure had been introduced as a separate bill in each House and each of these bills had a less number of such readings, though each House had read three times the same measure either as a House bill or a Senate bill, the Constitution of the State was gratified because the two bills constituted only one, being identical. It was also held

in this case that where after passage of the bill by the Senate a motion to reconsider the vote was made under Rule 52, but the bill had already been sent to the House, where it originated, by authority of the Senate, and the House had sent it to the Governor, who had signed it, the motion to reconsider was no longer to be deemed pending as a bar to the finality of the Senate's action, *because* the matter had been placed by their own authority beyond their own control.

The case is offered to prove that the law of West Virginia is, that to ascertain in a disputed case whether a measure had passed their Legislature, the Courts must look to both the journals and the rules of that body to learn whether in fact it passed the two Houses in accordance with their rules and their true interpretation; and further, that two identical measures offered in both Houses are in contemplation of the law governing their passage only one single measure.

Hence it is contended there never was but *one question* before the West Virginia Senate, namely, ratification of the amendment. The Senate refused to ratify, and then refused to reconsider its refusal, and by its rules, which are law in that State (whatever they may be elsewhere), and whose violation may be inquired into by the Courts, that ended the matter. "The question could not again be drawn into debate," and the subsequent proceedings were nugatory.

Further it is contended that the point of order raised against "drawing the question again into debate" was well taken, and whether well taken or not, the rules still required that the chair pass upon it. The chair refusing to do so, and so violating the rules, and further, in violation of them, submitting the point of order to a direct vote, that vote was purely nugatory, and the point of

order has never been disposed of. This renders void because out of order the subsequent vote purporting to pass the resolution.

All this is matter of West Virginia law alone, based on the evidence of that law furnished to the Maryland Court for its information, in the shape of cases cited (p. 107).

If this evidence is given what we contend is its legal effect, it appears that judged by the standards of West Virginia for ascertaining whether its Legislature did or did not pass a certain measure, as a matter of *law in West Virginia*, that is to say, as a *matter of fact* viewed from the outside, the West Virginia Legislature failed to adopt the resolution.

9. That the law of Tennessee, as evidenced by the decisions of its Supreme Court, cited to the Court below, namely, *Brewer vs. Huntingdon*, 86 Tenn. 732; *State vs. Algood*, 87 Tenn. 163, decided by Judge, later Mr. Justice LUTON, and *Webb vs. Carter*, 129 Tenn. 182, in regard to the criterion by which it is to be ascertained whether or not a certain measure passed the Legislature or failed of passage, has been determined as follows:

(i) Where it appears affirmatively, by entries on the journals, that an act was rejected in either House, it is void, although it may also appear by proper journal entries, that it was signed by the respective speakers in open session and that fact noted on the journals, and that it was approved by the Governor (86 Tenn. 732).

(ii) That no vote for or against the final passage of a bill is to be regarded as final, if a motion to reconsider said vote has been duly entered, until such motion is disposed of. Where such motion to reconsider the rejection of a bill has been entered, but its final fate is not affirmatively shown by the

journals, then the subsequent signing of the bill in open session by the two speakers and its approval by the Governor gives rise to the presumption that the motion to reconsider prevailed, in the absence of affirmative evidence that it did not (87 Tenn. 163, 168, 169).

(iii) That where the journal shows, even presumptively, that no quorum was present when certain action was purported to be taken by the House, then such action is null and void, and could not be cured by subsequent action attempting to ratify what was done. That the Court may look to the House journal to ascertain whether a quorum was or was not present when it is alleged a bill was passed, and if it appears there was no quorum present the Court must declare the alleged act void (129 Tenn. 182, 187, 208).

NOTE: There is no evidence whatever of the Resolution of Ratification in this case having been signed by the speakers in open session, as Mr. Speaker Walker never signed it, or admitted its passage. The journal on the other hand affirmatively shows, first, the absence of a quorum when the motion to reconsider was first voted on; second, the fact that with a quorum present the House subsequently passed the motion to reconsider, and defeated the resolution.

10. That the Secretary of State of the United States refused to consider any question as to the fact of ratification by any Legislature or the validity of such action on its part, provided that the "proper authorities of the State," whom he does not otherwise define, furnish the State Department with "official notice" that their State Legislature has ratified (p. 109).

III. Defendants' Evidence.

1. The Defendants first offered the Proclamation by the Secretary of State of the United States, dated

August 26, 1920, to the effect that the Amendment had been ratified by Legislatures of "three-fourths of the whole number of States in the United States" and had "become valid to all intents and purposes as a part of the Constitution" (p. 110).

The States enumerated, 36 in number, include Missouri, Tennessee and West Virginia, also Texas and Rhode Island, which are subject to special considerations hereinafter to be mentioned (post, pp. 102, 108-9).

2. The Defendants also offered a copy of the certificate received by the Secretary of State of the United States from the respective chairmen of the Joint Committee on Enrolled Bills of the Senate and House of Delegates of West Virginia (p. 113, see p. 103), containing a resolution of ratification of the proposed amendment purporting to have been adopted by the Legislature of that State.

3. Also a copy of the certificate received by the Secretary of State of the United States from Gov. A. H. Roberts, of Tennessee, dated August 24, 1920, certifying that "Senate Joint Resolution No. 1" (of which a copy is attached, purporting to ratify the proposed amendment) "was passed and adopted by the * * * General Assembly of the State of Tennessee, * * * thereby ratifying said proposed Nineteenth Amendment * * * *in manner and form appearing on the Journals of the two Houses of the General Assembly of the State of Tennessee, true, full and correct transcript of all entries pertaining to which said Resolution are attached hereto and made part hereof*" (R., p. 114).

Attached is the transcript referred to (R., pp. 116-128) which as hereinbefore shown (ante, Brief, p. 6), is not "true, full and correct," but is contradicted in im-

portant particulars by the complete transcript furnished by Petitioners.

4. The Defendants further offered in evidence (p. 129) a copy of a certificate received on or about the 14th of September, 1920, by the Secretary of State of the United States from the Secretary of State of Connecticut, showing that on that date (subsequent to the Proclamation) the Legislature of Connecticut had ratified the Amendment.

IV. Rebuttal.

The Petitioners then offered in rebuttal a copy of the certificate received on or about September 7, 1920, and sent on or about September 3, 1920, by Gov. A. H. Roberts, of Tennessee, to the Secretary of State of the United States, hereinbefore referred to (ante, Brief, pp. 6, 9) and containing the Journal of the Tennessee House for days subsequent to those included in the previously forwarded transcript, and showing that a part of the former entries had been expunged and that the House had reconsidered and defeated the Resolution of Ratification (R., pp. 131-142).

7. THE PROPOSITIONS OF LAW PRESENTED BELOW.

These are contained in 13 Prayers offered by Petitioners and rejected by the Court, and are found on pages 164-8 of the Record. They will be hereafter discussed under the appropriate headings.

SPECIFICATION OF ERRORS.

All the errors set forth in the Assignment of Errors (R., p. 164) are relied on as grounds of reversal, but they are here more specifically restated:

1. The Court below erred in holding that the Nineteenth Amendment cannot be distinguished in the principles applicable to the question of its validity, from the Fifteenth.

2. The Court below erred in holding that when the Supreme Court assumed the validity of the Fifteenth Amendment it necessarily decided that it was within the power to amend regardless of the consent of the several States or of their people.

3. The Court below erred in refusing to consider or pass upon the contentions (a) that the Nineteenth Amendment was beyond the scope of the express power to amend, and (b) that it would so operate as to fall within the express prohibition upon the exercise of that power as applied to non-consenting States, upon the ground that those contentions had already been precluded by decisions of this Court.

4. The Court below erred in holding in effect that an express prohibition in the Constitution against depriving any State without its consent of its equal suffrage in the Senate, which would be demonstrably violated by a measure conferring the power of choosing the State's representatives in the Senate upon persons on whom the State and the people thereof had not conferred it, without the State's consent, must be disregarded as no longer in force, merely because the State or its citizens had never legally protested against the operation of another measure,—the Fifteenth Amendment,—which forbade discriminations based on race, colour or previous condition of servitude, and which for half a century had been acquiesced in universally and so consented to by States and people as a part of the settlement of the issues involved in the late Civil War.

5. The Court below erred in holding in effect that the intention of the people of the United States in adopting the Constitution, to establish an indestructible union of indestructible States, might be nullified by the adoption of amendments destructive even of the corporate existence of such States,—for the reason that they disfranchise in whole or in part the electorate of those States through whom alone the corporate will can be expressed, and by whose express or implied sanction alone any corporate act could be performed,—because of the previous adoption of a certain amendment,—the Fifteenth,—which might measurably have had that effect and which might have been, but for nearly half a century was not, objected to by or on behalf of the people of any State on that ground.

6. The Court below erred in holding that the recognition of the limits which the people of Missouri had prescribed to the action of their Legislature in giving the assent of their State to proposed amendments to the Federal Constitution would nullify, destroy or amend the power of amendment delegated in Article V of the Constitution.

7. The Court below erred in holding that the Constitution prohibits the people of the several States from withholding from their Legislatures respectively the right to grant the assent of such States to such Federal Amendments as change the source of the governing power of those States.

8. The Court below erred in holding that the people of the several States may not take steps to preserve their right of local self-government by forbidding their respective Legislatures to surrender such right by ratifying Federal Amendments that might impair or destroy it.

9. The Court below erred in holding that the refusal by the people of a State to permit their own Legislature to ratify an amendment destroying or impairing their right of local self-government, is an attempt by the people of such State themselves to exercise the power of amending the Federal Constitution.

10. The Court below erred in holding that the people of a State may not refuse to permit a Legislature elected by them before a given amendment has been proposed to grant to it the assent of their State, and provide that only a Legislature subsequently elected shall have such power.

11. The Court below erred in failing to hold that, since Article V imposes no duty upon the several States either to ratify or to act upon Federal Constitutional Amendments, but leaves it wholly to the States to determine "when," if ever, the States either by their own Legislatures, or by Conventions which can only be called or elected by the States themselves under their own laws and at their own discretion, shall or may grant their assent to such proposals, the States are at liberty under the Federal Constitution to fix the *time when* either the Legislatures or Conventions, as the case may be, shall be called together to act in such matter, and that when they have so fixed such time and by reason of the violation of such provision an act purporting to ratify an amendment is void under the law of the State, it cannot be considered as an act that grants the assent of the State to such amendment.

12. The Court below erred in failing to hold that, since Article V *imposes* no duty to ratify, but leaves to the States in their discretion the right to fix the *time when* their Legislatures may ratify Federal Constitutional Amendments, it leaves to the States the right to

say that their Legislatures shall *never ratify* such amendments as may impair the sovereignty or right of local self-government of the people of such States.

13. The Court below erred in ruling upon the facts and the law of West Virginia offered in evidence, that the Senate of that State had passed the resolution of ratification.

14. The Court below erred in ruling that in the matter of ratifying amendments any Legislature is not subject to its ordinary rules of procedure applicable to the accomplishment of any act of that body, or that those rules may be disregarded in determining whether such act of assent has taken place, although by the law of the State attempted action in disregard of such rules is deemed to be null and void.

15. The Court below erred in holding that the question of ratification *vel non* by the Legislature of Tennessee was not necessary to be decided in this case.

16. The Court below erred in holding that none of the prayers offered by the Petitioners below presented propositions necessary to be decided in this case.

17. The Court below erred in sustaining the action of the trial Court in refusing all of the prayers of Petitioners.

ARGUMENT.

I. THE NINETEENTH AMENDMENT IS INVALID AS EXCEEDING THE LIMITS OF THE POWER TO AMEND THE CONSTITUTION OF THE UNITED STATES DELEGATED IN ARTICLE V.

We shall discuss this question under two heads, first, that it exceeds the *Implied Limits* of the Amending Power, and second, that it exceeds the *Express Limits*, laid down in Article V of the Constitution itself.

1. THE IMPLIED LIMITS EXCEEDED.

a. No Decision Denies Doctrine of Implied Limits.

At the outset we are met by a categorical denial on the part of our opponents that there are any implied limits to the amending power.

In this denial they cannot fortify themselves with a single opinion of this Court. In *Rhode Island vs. Palmer* (253 U. S. 350), reported under the title "*National Prohibition Cases*," this Court held:

"The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution."

We know of no other case in which the existence and extent of implied limits to this power was raised in which this Court expressed any opinion whatever upon either point. To the extent that prohibition of making or dealing in intoxicating liquors may be enacted by Constitutional Amendment, the limits of that power extend. How much further and in what directions, beyond the obvious and accepted bounds of previous amendments hitherto unchallenged, has never been decided.

In holding that National Prohibition did not exceed the limits of the power this Court did not see fit to give any reasons, so that the scope of the one decision bearing on the question cannot even be measured.

It was perhaps the part of wisdom to withhold such reasons. Thus was avoided any possible misconstruction that might prejudice the contest of other and more radical amendments, perhaps affecting, as does the one at bar, the sovereignty of the people, the source of all governmental power whatever.

Such contest involves far more than a mere shift of a portion of the "power of police" between the State agencies of the people (Legislatures) and their Federal agency (Congress) such as was there considered.

Obviously a mere denial of the existence of *implied limits* is based upon no judicial authority, and must stand or fall only as sustained or refuted by *history, analogy or reason*.

b. History Sustains the Doctrine.

i. *The Legislatures, Even of Three-fourths of the States, Were Never Supreme.*

"The people made the Constitution, and the people can unmake it. It is the creature of their will and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; *not in any sub-division of them*. The attempt of *any of the parts* to exercise it, is *usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.*" (i. e., the Courts.)

Cohens vs. Virginia, 6 Wheat. at 389.

What does this passage by Chief Justice MARSHALL mean except that the people are sovereign over the Constitution and over all powers therein granted, and that they have constituted the Courts as guardians of their sovereignty, charged with the duty of repelling all assaults upon it "from whatever source derived"?

A more exalted function has never been conferred upon any human tribunal.

But whom does MARSHALL mean when he says "the people"? He has himself told us:

"The Convention which framed the Constitution was indeed elected by the State Legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted; and by the convention, by Congress, and by the State Legislatures, the instrument (Constitution) was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments." (Italics are by MARSHALL, C. J.)

McCulloch vs. Maryland, 4 Wheat. 316 at 402.

The sovereign people have been here defined by MARSHALL, and in them alone, as he tells us, resides "the supreme and irresistible power to make or to unmake." The Convention could not do this. The State Legislatures, even, be it noted, *all* the State Legislatures could not do it.

"Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties (i. e., governments) were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all." *Ibid.*

Madison, in the Virginia Convention, in advocating ratification, said:

"Who are parties to it? The people * * * but not the people *as composing one great body*, but the people as composing thirteen sovereignties."

3 *Ell. Deb.* 99.

If all the State Legislatures could not "make" the Constitution, shall it be now contended that three-fourths of them can "unmake" it, by ratifying amendments repugnant to and destructive of its principles and purpose?

It is answered that the people have once and for all granted to three-fourths of the Legislatures acting upon proposals of the Congress the same omnipotence that they themselves possessed when they made the Constitution. That is, they bestowed on their creatures their own power, exclusively. Did MARSHALL believe this when he said, "the supreme and irresistible power to make or to unmake resides only in the whole body of the people"? Did he mean a two-thirds majority in Con-

gress, and the Legislatures of three-fourths of the States, elected often without a thought of the question of an amendment which might later be proposed to them by the Congress, perhaps called into special session in a political exigency for the purpose of amending the very law under which they existed, and which they were by the people of their own States forbidden to change?

Did the people of the several States in adopting the Constitution ever dream that they were setting up the Legislatures, not necessarily even of their own States, but of *other* States, as a power supreme over themselves? Was the creation of a National Government intended to endow the General Assemblies of *some of the States* with an omnipotence that the General Assemblies of *all the States together* had never claimed?

Lastly, did the people of the several States, who ratified the Constitution, ever dream that they had endowed the General Assemblies of *some of the States*, acting upon proposals of the Congress, with power to disfranchise the very people who by their votes had adopted the Constitution, or to force those voters to share their power with persons whom the people in the respective States had by their own freely adopted Constitutions excluded from this power? Did they dream that a qualification of their own suffrage might not only be thus imposed upon them by the external power of the Legislatures of three-fourths of *other States*, but also thereafter *eternally maintained by the Legislatures of one-fourth of the States plus one*? Did they think it would be possible to write into the Constitution such a restriction on the right of voting that a mere handful of legislators distributed among 13 out of 48 States in the Union,—not more than about 200 men,—could forever prevent the people from either enlarging or restricting that right? Did they realize that one-fourth

of the Legislatures plus one could prevent the voters who by their own State Constitutions might exercise the suffrage from acting at all, because by the mere will and power of their creatures,—of their delegates,—or of the delegates of other States,—they had been deprived of their own right to vote,—of their voices as members of the sovereign people?

Certainly a true interpretation of the history of our Constitution would preclude any construction of its granted powers that would subject the suffrage, which is the ultimate and basic expression of the sovereign will, to any control whatsoever *except the control wherein the Constitution found it and left it*,—the control of the sovereign people, who are not a “common mass” and “of consequence, when they act, act in their States.”

Any other construction necessarily denies the ultimate sovereignty of the people of the United States, and vests it in a fraction of the Congress and a number of the Legislatures, enabling these bodies to “unmake” the Constitution and substitute therefor any creation of their fancy.

For if three-fourths of the Legislatures can not only change their own constituencies by depriving some of their constituents of the right to vote or by conferring the same right on others, but also can change the constituencies of the remaining Legislatures and so change the entire source of power both in the Nation and the several States, they are obviously superior to the people themselves. The people can act only by their permission. The choice of representatives no longer belongs to the people, but to such individuals as those “representatives” may select. And if the Legislatures of three-fourths of the States see fit to disfranchise a majority of the people of all the States, thenceforward

the people or a majority of them will be excluded from all power as long as more than *one-fourth* of the Legislatures see fit to keep them excluded.

Would any student of American history contend that the people at any time intended to bestow upon State Legislatures such power? It is true that some State Constitutions could be amended by the acts of two successive legislatures, but such a provision of necessity includes an intervening election, i. e., an appeal to and sanction by the people. In Colonial times some of the Provincial Legislatures could by their single act fix or alter the qualifications for suffrage, as did the General Assembly of Maryland by Act of 1716, Ch. 11. Possibly such power in some instances survived the Revolution for a few years. But it applied only to the very constituency of the Legislature concerned. Since those days every State without exception has forbidden its Legislature without consulting the people in some way to do any such thing. The denial of power to Legislatures to alter the right of suffrage of their own constituents has been absolutely universal for well over a hundred years, and practically so from a period antedating the Constitution. If then the American people, since they became independent, have never shown a disposition to let the Legislatures of their own States exercise such power, how could they be supposed to have conceded it to the Legislatures of any number of States other than their own and in such fashion that it might be exercised utterly regardless of their own will?

History clearly supports the doctrine that no powers granted to Congress or State Legislatures or both by the American people were ever intended to be so broad as to exalt the representative over the people represented, and permit him in the name of the people to assume the sovereignty over them.

ii. *The Conventions, Even of Three-fourths of the States, Were Never Supreme Over the People of Other States.*

Article V provides in the alternative for the submission of amendments directly to the people, acting through State Conventions in the same manner as they acted when by their sovereign will they ordained the Constitution.

Would the same historical objections to an unlimited power of amendment obtain, if the ratification were to be accomplished by the people of three-fourths of the States in their respective conventions assembled?

History is equally clear on this point, and the very words of the Constitution supply the answer. Article VII reads:

“The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution *between the States so ratifying the same.*”

It was never even pretended that the people of *some States*, even of three-fourths, or of twelve-thirteenths of them, could possibly impose the Constitution upon the people of other States that did not assent to it.

North Carolina and Rhode Island failed to ratify until after the Constitution was established and the Federal Government organized. It is incontestable that until they ratified they remained wholly free from its operation and obligation.

Why was this so, if the people had by a great preponderance of voices already adopted it? Simply because there was and there is *no such body* as the “*People of the United States*” viewed as “*one common mass.*”

"They assembled in their several States,—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States."

McCulloch vs. Maryland, *supra*.

Not "*when they acted*," but "*when they act*," now or at any other time. And he might have added, for it was a fact, "they act under the laws of their own States."

So acting they can "make or unmake," but "not any sub-division of them." "The attempt of any of the parts to exercise it (the power to make or unmake) is *usurpation*."

Cohens vs. Virginia, *supra*.

Does this mean that the people in Conventions in three-fourths of the States can unmake the Constitution? Were the people of Maryland, or of little Delaware, or recalcitrant Rhode Island, any more secure in their liberties from the actions of the *Conventions* of Virginia, Pennsylvania or Massachusetts, than from the action of the Legislatures of those comparatively great and powerful commonwealths? Could they have intended to grant to foreign conventions any greater powers than they intended to grant to foreign legislatures? If they intended it why did they not say so?

The clear answer of history is that they did not. They desired to adopt the Constitution, with a provision permitting its own amendment without the burden of the "liberum veto" of insignificant minorities such as had wrecked the Polish Republic and had brought their own confederation into the contempt due to impotence. But

that they desired or intended to enable any majority to disintegrate the Union by slaughtering any of the parts of which the Union was composed is inconceivable.

True, Roger Sherman expressed this fear in the Convention, but this was *before the Constitution had been completed*, and the vital and essential part of the proviso which he himself drew up and proposed to meet the danger was adopted with a *unanimity* which Madison tells us was "*dictated by the circulating murmurs of the small States.*"

5th Ell. Deb. 532-4.

When the people of the several States had the Constitution before them for ratification it contained an unalterable provision to the effect that *the States, as political bodies capable of consenting or refusing to consent* must forever remain the members of the Union until they should severally consent to their own extinction.

No three-fourths majority of other States, however voiced or ascertained, could ever under the Constitution destroy the political integrity, the separate corporate existence, of the people of any one of the several States whose Union composed the United States of America.

The idea of "political dreamers" that the people of the several States might be "compounded into one common mass" was so effectually repudiated by the Convention itself in the secrecy of its sessions, that JOHN MARSHALL was more than justified in believing that no man had been "wild" enough to think of it.

"Of consequence" the ultimate and only sovereignty in America resides in the people of the several States. Their right severally to express their corporate will must be a right beyond the power of "any of the parts"

of the Union or any of the agents or delegates of the people, without their own several corporate consent, either to impair or to destroy.

iii. *The Sovereignty of the People Exercised Concurrently by States.*

The full exercise of sovereignty can only be by the concurrent action of the people of all of the several States. By that concurrent action, the people of each State acting in their State and under its laws, the Constitution was made. The people who made it, being "the people of the States of New Hampshire, Massachusetts," and the rest, so described themselves, until it occurred to the Convention that some of those States might not ratify and the Preamble would accordingly proclaim a falsehood. Hence the wording was changed to "The People of the United States," but the meaning was not changed. (1 Ell. Deb. 224, 298; 10 Fed. St. Ann., 2nd ed., 95).

They desired to form "a more perfect union," but it was to be a union,—“a perpetual union made more perfect,”—of free commonwealths,—of “indestructible States.” “No political dreamer” had thought “of breaking down State lines.” The sovereignty of the States remained what it had been before, except “as it had been abridged,”—not destroyed,—by the Constitution. Legally to destroy the concurrent sovereignty of the people of New Hampshire, Massachusetts, Maryland, and the rest,—that is the sovereignty of the people of the United States,—requires the concurrent act of the people of all of them.

Here lie the historical limits of the amending power.

c. Analogy Sustains the Doctrine.

In the absence of decisions bearing upon the extent of the amending power let us consider those that bear upon other powers, granted in terms equally absolute, in the Constitution.

i. *Limits of Taxing Power.*

Congress shall have power to lay and collect taxes, duties, imposts and excises. This power is subject to three express limitations,—apportionment as to direct taxes, uniformity as to duties, imposts and excises, while the taxation of exports is forbidden.

It might be inferred that the expression of these limitations excluded all others. This Court has held the contrary.

“The question is whether the power to lay and collect taxes enables the General Government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States. We do not say the mere circumstance of the establishment of the Judicial Department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power ‘to lay and collect taxes,’ but it shows that it is *an original inherent power never parted with, and in respect to which the supremacy of that government does not exist*, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officers from taxation by the

General Government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the federal officer in *Dobbins vs. Erie Co.* (16 Pet. 435) from taxation by the State; *for in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government.* And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessary, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that *there is no express provision* in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the *exemption rests upon necessary implication*, and is upheld by the *great law of self-preservation*; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The Collector vs. Day, 11 Wall. 113, 126-127.

Could any more perfect analogy be found, or would the language of the learned Justice (Nelson) be any less convincing if applied to the case at bar?

It is answered that this case involves the amending power, far higher in its nature than any mere power of Congress such as that to lay and collect taxes. But why is it a power of any higher nature? Has it any higher source? Are they not both powers delegated by the people of the United States in adopting the Constitution?

Neither has any existence apart from the Constitution itself. Granted that the amending power is of broader scope, does it transcend the "great law of self preservation" by which the Courts will protect the sovereign powers reserved to the States and the people thereof as fully as those granted to the Congress? As this Court said in the same case:

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, *and the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations*, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for *preserving their existence*, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, *which power acknowledges no limits* but the will of the legislative body imposing the tax."

Ibid. 125.

ii. *No Unlimited Power Granted by Constitution.*

If the existence of the States is indispensable to our continued membership in the family of nations, or, as expressed by this Court in *Lane County vs. Oregon*, 7 Wall. 71, if "without the States in union there could be no such political body as the United States" can this Court hesitate to "preserve their existence" even against "a power which acknowledges no limits but the will of the legislative bodies" which exercise it?

Mr. Justice MILLER, speaking for this Court in *Loan Association vs. Topeka*, 20 Wall. 655, at 663, said:

"The theory of our governments, State and National, is *opposed to the deposit of unlimited power anywhere.*"

Guizot, perhaps the most profound and accurate political philosopher of the 19th century, said:

"The true theory of sovereignty, that is, *the radical illegitimacy of all absolute power, whatever its name and station, is the principle of representative government.*"

Hist. de l'Origine du Gouvernement Représentatif, II, 12.

What is meant by these doctrines, except that the creature that exercises the power can never exalt itself over the creator that conferred it?

"Without this power (the establishment of the judicial department, and the appointment of officers to administer their laws) and the exercise of it, *we risk nothing* in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

Collector vs. Day, supra, 126.

How much would this Court risk in saying that without the power to determine who should have the right of voting, who should control its government, no one of the States could long preserve its existence? Surely the latter power is the more essential of the two.

The threat to the State's existence in either case comes from a power of equal dignity and pedigree. The people of the United States conferred both the power to tax and the power to amend. They themselves, who, "when they act, act in their States," who are not "one common mass" but a perpetual union of free self-governing communities, are immune from destruction as such self-governing people by either power.

Their right to govern themselves is a pitiful illusion if their representatives or the representatives of some of them can rob them all of their voice in such government.

iii. *Limits Implied From Necessity.*

The doctrine of *Collector vs. Day* cannot be regarded by this Court as obsolete. It has very recently been reaffirmed and amplified in *Evans vs. Gore*, 253 U. S. 245, 255, speaking by Mr. Justice VAN DEVANTER:

“True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector vs. Day*, 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a State court; in *Pollock vs. Farmers' Loan and Trust Co.*, 157 U. S. 429, 585, 601, 652, 653, it was held—the full Court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in *United States vs. Railroad Co.*, 17 Wall. 322, there was a like holding as to municipal revenues derived by the City of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a *prohibition implied from the independence of the States within their own spheres.*”

The case of *Evans vs. Gore*, *supra*, is in some ways the most suggestive and significant of all. It had been held that State instrumentalities, revenues and means of operation were immune from the taxing power, because without the States in union the United States would cease to exist. But would the United States cease to exist without a federal judiciary? Possibly not. The “Judges in every

State" are equally bound to protect and enforce the Constitution, and their ability and willingness to do so must be presumed. But if the federal judiciary is to remain in existence it *must remain independent* or the Constitution itself will rock on its foundations. It is precisely because, as MARSHALL said, that "*usurpation*" of the people's sovereignty must be "repelled by those to whom the people have delegated their power of repelling it," that those ultimate defenders of popular sovereignty must be protected from those who to compass their usurpation would be only too willing to bind and gag the guards.

The literal language of the 16th Amendment,—"*income from whatever source derived*,"—cannot be held by this Court to mean that the sovereignty of the people in their several States is to be wielded henceforth only at the discretion of the taxing power of Congress, or that those who alone can protect that sovereignty from such assaults may be stabbed in the back while performing that duty.

No power granted by the Constitution in whatever language has heretofore been held sufficient, directly or indirectly, to destroy the States without whose existence we would "disappear from among the family of nations."

iv. *Similar Necessity Limits Other Constitutional Powers.*

The amending power itself, whenever employed so as to give rise to a question whether its exercise had in effect destroyed the States has been held to have produced no such results.

In the *Civil Rights Cases*, 109 U. S. 3, this Court expressly refused to admit that the 13th and 14th Amendments in spite of their specific grants of power to Congress had authorized that body to "enact a municipal

code for the States." And yet their language literally construed was plainly susceptible of that very interpretation, as Mr. Justice HARLAN showed in his dissenting opinion, in regard to those rights of liberty and property which had been as he says "*granted by the nation* to the negro race by those Amendments." (Ibid 46, 56).

And in the *Slaughter House Cases*, 16 Wall. 36, 77, 78, this Court through Mr. Justice MILLER was even more emphatic, and held the argument from consequences against such a construction of the 14th Amendment might not ordinarily be "conclusive," but when "these consequences are so serious * * * so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people; the argument has a force that is *irresistible*, in the absence of language which expresses such a purpose too clearly to admit of doubt."

If such indubitably clear language as the amendment did *not* contain had been used, a different question would have been presented to the Court, although there is no suggestion in the 14th Amendment of doing what MARSHALL said half a century earlier, "no political dreamer" had ever been "wild" enough to think of doing, i. e., of obliterating the States as the components of the Union. This task has been reserved to the "political dreamers" of a later age.

So this Court, through the long years, has repeatedly been called on to defend the States and their people, who are the sovereign people of the United States, from the

misuse by their agents of powers granted by themselves. In doing so this Court has hitherto had to rely only on the implied limitations based in final analysis on the fact that the American people are not a "common mass" but an aggregate of free self-governing communities expressive of their inherent sovereignty, which can only be exercised "safely, effectively and wisely" by community action.

If the example of the pitiful shipwreck of the vast "common mass" of humanity known as the Russian people is not sufficient to deter the leaders of our day and generation from abandoning the local self-government of our fathers and treading the path that leads to irresponsible power even over the precipice into which such power has always plunged, then the sacrifices of a thousand years to the cause of Liberty will have been offered in vain.

d. Reason Sustains the Doctrine.

i. State Sovereignty Inherent, Not Permissive.

"When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the different States. These powers proceed, not from the people of America, but from the people of the several States, and remain after the adoption of the Constitution what they were before, except so far as they may be abridged by that instrument."

Sturges vs. Crowninshield, 4 Wheat. 193.

That is to say the people, within their States, retained all the sovereignty which they by the collective action of their States had not conferred on their joint agent—the "national legislature." Did they retain this sovereignty as of right, or only by permission until by amendment that national legislature with the assent of some of the State Legislatures should take it from them?

We are not questioning the legitimacy of reapportioning powers between States and Congress. Congress is after all the mere creature and joint agent of the people of the several States. These people may see fit to vest the exercise of any governmental powers in any agency they may select. Where that agency is elected by them, as is the Congress, it would be doubly absurd to deny their power to vest in it any functions they choose. They may vest in Congress the power to tax, the power to raise armies or declare war, the power to regulate the liquor traffic, the power to enforce against the State *governments* such prohibitions of power as they have imposed on the latter.

The people of the States constituting the Union collectively, not as a mass, but as a Union of free peoples, are omnipotent. Through designated agents whom they have once unanimously authorized to act as such we may grant for the sake of argument that they may by appropriate action in three-fourths of the States transfer powers from one *agency* to another, or impose or remove prohibitions on their exercise. But it would be a contradiction in terms to say that they have empowered their agents, or any part less than the sum total of the States or free communities in Union which are the people, to abolish or restrict the power of the people themselves. That power remains, and it consists of this, *the power to select the agents* on whom any specific governmental powers are conferred. Deprive the people of the power of voting for the persons who are to make the laws under which they must live, and the sovereignty of the people is gone.

Concede that by amendment they may be so deprived, and their sovereignty does not exist.

ii. *Popular Sovereignty in England Distinguished.*

The case of England may be cited, but it is not appropriate. England is governed not by a written constitution but by binding customs that in so conservative and ancient a society are practically an equivalent. If Parliament disfranchises voters, or enfranchises those who were not, its members must nevertheless spend their lives among the people affected by their action. Their responsibility is vividly personal. Social ostracism or even personal fear must make them responsible to the public opinion of their fellow-subjects. Besides which, use and wont are potent factors that cannot be disregarded.

Within our States we have a perfect analogy. State conventions once called into being, are within the sphere of State powers omnipotent. The Virginia Convention of 1901, to cite the most recent example, adopted a new Constitution and *proclaimed it as the law of the land*. This Constitution disfranchised many of the voters, but the substantial public opinion of the State approves and supports it. The practical responsibility of the members of such conventions, due to the fact that their acts affect the lives of all those among whom their lot is cast, is a nearly perfect safeguard against tyranny by any such bodies.

iii. *Irresponsibility of Amending Power Applied to Suffrage.*

But consider the amending power under our Federal Constitution. What responsibility does a legislator in California bear to the people of Maine? Will fear of their displeasure or hope of their approval govern his acts?

In voting to take from the Legislatures of both Maine and California a certain power and vest it in Congress the legislator affects directly his own constituents, and does not wholly deprive the people of the States of their real power, for through their representatives in Congress and especially through their inalienable suffrage in the Senate they can still directly participate in its exercise.

But in voting for an amendment that confers or that denies the right of suffrage, the California legislator is voting to dilute or to deny rights enjoyed by the citizen of Maine with which he has not only no concern, but which are a part of the inherent sovereignty of the people of Maine without the possession of which they can do no act whatsoever. This power to determine who shall govern them has been not transferred, but abolished. If Californians can deprive the men of Maine of their votes, or *vice versa*, where does *any* inherent sovereignty remain?

It is answered that such legislators in ratifying such amendments are still responsible to their constituents. But what if by their votes they have deprived their constituents of all political power, or so diminished it that they need fear them no longer? Above all, suppose the instant case, where the California legislator does not by his action affect presently his own constituents at all, sex distinctions having already been abolished by that State, but does directly contribute to deprive the male citizens of Maine, or of Maryland, of half their political power against their will,—what sanction exists for his conduct?

iv. *Indestructibility of States One of Purposes of Constitution.*

This Court has held in a memorable opinion by Chief Justice CHASE:

“ ‘The *people of each State compose a State*, having its own government, and endowed with all the functions essential to separate and independent existence,’ and ‘without the States in Union there could be no such political body as the United States.’ Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may not unreasonably be said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an *indestructible Union composed of indestructible States*.’ ”

Texas vs. White, 7 Wall. 700, 725.

Although Chief Justice CHASE may not mean that three-fourths of the States could not compel a reapportionment of powers among the agencies which these indestructible States, i. e., the people who compose them, had created, he did mean that the sovereignty of the people of the States was indestructible under the Constitution or else no meaning whatever can be assigned to these words.

It has been argued that he was speaking of the Constitution as it then was. Granted. The Constitution contained Article V then as always, and yet he says, “The Constitution *in all its provisions* looks to an indestructible Union composed of indestructible States.” If this does not mean that the States cannot be destroyed under the Constitution we are at a loss to comprehend the words.

But if the Legislatures of California and thirty-five other States, who are in no way responsible to the people of Maryland can enact that certain persons on whom the people of Maryland have never conferred such right shall vote, or that *only* such persons shall vote, then they may deprive the people of Maryland of any voice whatever in their own government, and hence destroy a State that the Constitution was ordained for the purpose of preserving as an indestructible component in an indestructible Union.

"The Constitution in all its provisions *looks to*" such a perpetual Union of indestructible self-governing States. This signifies that in the deliberate judgment of this Court the *people intended to establish* such a Union of States.

This Court has expressly so held:

"The National Constitution * * * assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, *it intended to make them so.*"

White vs. Hart, 13 Wall. 646, 650.

If the people of the United States intended this, how could they have intended at the same time to grant to any agencies, State or Federal, or even State and Federal, the power to destroy either Union or States?

v. *Rule of Construction that Accomplishes Purpose of Instrument is Obligatory.*

One cardinal rule of construing general terms in all statutes, charters, grants, and instruments whatever, is this: to give the words such construction as will if pos-

sible produce the effect intended by the persons or body that employed the words, and not such as will produce a contrary effect.

“When investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. *This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions.* If the general purpose of the instrument is ascertained, the language of its provisions *must be construed with reference to that purpose and so as to subserve it.*”

Legal Tender Cases, 12 Wall. 457, 531.

“The great and leading intent of the Constitution must be kept constantly in view upon the examination of every question of construction.”

Ex parte Yerger, 8 Wall. 85, 101.

The only cases where the word “amend” has been so construed as to involve the idea of destroying the instrument amended, or nullifying its manifest purpose, are in Parliamentary Law, where it is usually legitimate for the express and well-understood purpose of defeating a proposed enactment, to move to “amend” by striking out all that follows the enacting clause.

If this action were taken by a statute in regard to a previously existing Act, the new Act would be called not an “amending” statute, but a “repealing” one. This has received judicial recognition, and it has also been said that a statute in derogation of the common law is not an “amendment” of the common law.

State vs. Hubbard, 148 Ala. 391, 394.

Of course there is a wide difference between the construction of general words such as “amend” in relation

to the acts of persons or bodies still in existence and capable of either totally changing or modifying their purpose as well as their acts, and the construction they would receive in relation to the changes to be introduced by others in instruments whose original creators are either dead or no longer capable of uniting or acting freely to express their views.

Where an irrevocable deed of trust, or a will, gives certain discretionary powers to trustees, or to devisees, to change the dispositions created, it is certain that the general purpose of the settlor or testator must be regarded in construing or measuring those powers. But a testator himself may by codicil to his will entirely reverse the purposes most clearly set forth therein. His own power of "amendment" is measured by the extent of his inherent right to "change his mind." That of his devisees must be measured by the extent of their *delegated* right to "change the mind" of their testator.

The analogy, we submit, is apt. A Legislature while in session can, subject to its rules of procedure, unquestionably "change its mind." It may therefore, after one or two readings of a bill, unless restrained by its rules, amend by striking out all the effective provisions, and thus nullify the bill's expressed purpose. It is like a testator still alive and of sound and disposing mind. But in regard to the power to amend some provision of the Constitution expressly granted to it, its operation is effective upon the previously expressed will of others, i. e., the people who adopted such Constitution, and hence must be governed by the purpose which they had in view when they conferred the power.

For example, the Constitution of Maryland (Article III, Section 57) provides as follows:

“The legal rate of interest shall be six per cent. per annum; unless otherwise provided for by the General Assembly.”

In construing this grant of authority to the General Assembly to change or “amend” a definite provision of the State Constitution, the Court of Appeals says:

“That the Legislature has the power to prescribe a rate of interest for all persons and all corporations either above or below six per cent. is not questioned. That is to pass a general law on the subject, but it has no power to authorize one person to charge six per cent. and another ten per cent. and another twenty-five per cent. The pernicious effects of such special class legislation are so obvious, that in the absence of plain language showing such to be the intention, *we are not to presume that either the framers of the Constitution, or the people who adopted it, meant to confer a power so extraordinary on the Legislature.*”

Citizens Sec. & Land Co. vs. Uhler, 48 Md. 455, 459.

In accordance with this simple and universal rule, the word “amend,” as applied to instruments created by another body, means make “better to carry out the purpose” of the creating power.

Livermore vs. Waite, 102 Calif. 113, 119.

The legislative right to “alter or amend” corporate charters, as reserved either in statutes or State Constitutions, is not unlimited, but must be exercised only so as better to carry out the primary purposes of the original act of incorporation.

Sinking Fund Cases, 99 U. S. 700, 720, and cases there cited.

Shields vs. Ohio, 95 U. S. at 324.

Zabriskie vs. Hackensack, 18 N. J. Eq. 178.

e. Summary.

The destruction of the States in Union, "without which there can be no United States," cannot fulfill the purpose of the founders. On the contrary, it thwarts their purpose and substitutes for a representative Federal Government and free States self-governing in local affairs, an irresponsible, unrepresentative, undemocratic tyranny, by bodies who legislate for other constituents than their own, and who cannot in the nature of the case be called to account by anyone.

The doctrine of an unlimited power of amendment in State Legislatures is a reincarnation of the ghost of Divine Right. It is based on the fiction of a Mass of Humanity, which never had any existence in fact, which never acted directly or by representation, but from which is supposed to flow to three-fourths of the Legislatures an unlimited flood of power, capable of swamping and obliterating the people of the several States in Union, and every institution, even the most sacred, which by their Constitution they intended to preserve.

The State Legislatures, if possessed of this unlimited potency of destruction, irresponsible to the alleged mass from whom this power flows (because it has no existence) and by hypothesis irresponsible to their own constituents whom they may flout at will, have become the most dangerous Frankenstein that any "political dreamer" was ever "wild" enough to invent.

The fact of our indissoluble, or undestructible Union, making us for National purposes, and with respect to the outside world, one Nation acting through the Federal Government, is not inconsistent with the denial of any form of irresponsible absolutism whatever in our land.

The War of the Revolution was fought to rid the land of a self-styled omnipotent legislature, the British Parliament, unrepresentative and *irresponsible* to the people of any of the Colonies, and capable of *destroying* their right of self-government.

It is inconceivable that those people within five years of the close of that war created voluntarily a new system of unrepresentative irresponsible absolutism capable of obliterating every vestige of their right of self-government.

Yet such a system the alleged almighty amending power is, in theory and in fact.

2. EXPRESS LIMITS OF THE AMENDING POWER.

a. History of the Proviso.

We do not insist further upon the implied limitations upon the power of amending the Constitution, for the reason that we are fully persuaded that the express limits laid down by Article V itself, when properly understood and construed, will be found sufficiently to protect the fundamentals of the right of local self-government. Those express limits, as contained in Article V, are as follows:

“Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that *no state, without its consent, shall be deprived of its equal suffrage in the Senate.*”

It would hardly be right to construe these limitations without a complete historical view of the matters to which they refer, and the purpose with which they were adopted.

First, it is to be noticed that they all have reference to the famous compromises of the constitution. It is also of psychological interest to note that they are inserted in the inverse order of the importance of these compromises.

The continued existence of the slave trade for twenty years was certainly one of the causes of dispute in the Convention, but it is not one of those that went to the foundation of the Government itself. Nevertheless, through fear that the settlement effected among the gentlemen composing the convention, in favor of the two then undeveloped states of the far South,—South Carolina and Georgia,—might be upset by the already strong sentiment against the slave trade,—on the part of those who did not profit from it, and therefore could afford to consider it a great moral wrong,—Rutledge of South Carolina insisted that the power of amendment should be limited so that this compromise could not be annulled. (5 Ell. Deb. 532.)

Another of the important, though not fundamental, controversies in the Convention, was that which raged over the question of direct taxation. It is not quite clear why the principle of the apportionment of direct taxes according to the census should have been preserved against the amending power for only twenty years, if it was to be placed beyond the reach of amendment at all.¹ It is to be noted, however, that if this part of the proviso had not been limited in its applicability to the year 1808, but had been indefinite as to time, the Sixteenth Amendment could never have been proposed or adopted.

The remaining part of the proviso,—suffrage in the Senate,—however, is unlimited as to time; and is therefore perpetual in its application.

When the former part of the proviso had been adopted, it no doubt first occurred to the members of the Convention that, while they had guaranteed to some extent the

Note 1. It was feared that by a head tax on slaves Congress might accomplish abolition. The proviso therefore suggests that the framers did not contemplate that abolition could be directly accomplished by amendment else the proviso would have been broadened to prevent this.

permanency of two of the minor compromises made in the convention, there was yet no guarantee of the vital and essential compromise, without which the convention would have adjourned two months previously with an ignominious confession of failure, and no constitution at all would have been submitted to the American people.

As soon as this point was made and insisted on, it was covered by the broad and emphatic language hereinbefore quoted. The fight was, however, a stiff one. The old alignment of the small states against the great was formed at once, but the New York delegates, Yates and Lansing, had long since withdrawn, and Luther Martin was no longer present to guide and counsel the true Federalists. With these exceptions the fight was waged by the same delegates who had forced the compromise itself. The motion to insert the proviso was made by Roger Sherman of Connecticut.

Connecticut, New Jersey, Delaware, a majority of the New York delegation, and Luther Martin, who at times controlled the vote of Maryland, had formed the dauntless minority, who, by their steadfastness, unselfishness and ability, had extorted from the domineering majority, composed of the representatives of the great and powerful states, those provisions of the Constitution which went to preserve its federal form; and, in so doing, made possible the growth of a true national spirit among all the American people. Under pressure of their renewed insistence, the objections of Madison and others were abandoned, and the proviso, clinching the great compromise was unanimously adopted.

The whole debate upon the proviso is given in Appendix A, annexed to this brief.

b. History of the Suffrage in the Senate and the House.

The letter and speech of Luther Martin to the Maryland Legislature, published in the first volume of Elliott's Debates (p. 345, etc.), tells the story of the contest in the Convention between those who wished to preserve and those who would have destroyed the States. We cannot reproduce this document but we trust the Court will read it again before forming any conclusions upon the matter now in question.

The outstanding features of the story as told by Martin—and they have never been disputed by historians—are these: There was a school in the Convention that wished to substitute for the existing states and confederacy a strong centralized government, approaching, in fact, if not in name, a monarchy, with representative features. The local institutions already in existence were to be permitted to survive, but only so far and so long as the Central Government could more conveniently forego their exercise.

Some of the members of this school came from small states; and, although they were not unattached to their state constitutions, they feared that these constitutions were not likely to survive, in view of the great powers and influence of their large and populous neighbours.

George Read and John Dickinson of Delaware were two of these. The State of Delaware was then, as now, insignificant in size and importance and commercially dominated by the State of Pennsylvania. Dickinson was the author of the well-known "Farmers' Letters" that had prepared the public mind for the Declaration of Independence, for which nevertheless he did not at that time deem the country prepared. He, therefore, refused the honor of being one of the Signers. Notwithstanding

that, however, he took an active part in support of the Revolution, and earned the reputation of a true patriot. These men were undoubtedly frightened and oppressed by the tactics, and probably still more by the spirit, of the delegations from the three great states, supported by those from the Carolinas and Georgia, who controlled the proceedings. They felt that, under the circumstances, if state lines were obliterated, and the "States thrown into Hotchpot," the actual liberties of the citizens in every part of the continent would best be preserved. They felt that the selfishness and ambition of the already prevailing state governments constituted the greatest menace.

If, however, it should become practicable to secure such a Federal Constitution as would recognize and protect their integrity and their right of self-government from the overwhelmingly superior numbers and power of the large states, the small states were unanimous in desiring a solution so favorable to their ideals. In fact, their representatives felt that no other plan could hope to be ratified by their people.

The representatives of Delaware came to the Convention under the express restriction that they should not assent to any plan that destroyed the equal suffrage of their state, as then enjoyed under the Articles of Confederation. Delaware, therefore, united with the other small states of Connecticut and New Jersey, securing powerful support from New York, whose delegates, Yates and Lansing, overruled Hamilton, and took the side of their smaller neighbors. The support they received from Luther Martin, however, was almost more valuable still, although unfortunately Martin did not always control the Maryland delegation, though he frequently divided it.

The Virginia Plan,—so-called,—upon which the Convention as a Committee of the Whole first expended its labors, provided for a National Legislature consisting of two branches, of which one branch was to be elected “by the people of the several States * * * and subject to recall.” The second branch was to be elected by the members of the first branch from nominees submitted by the State Legislatures. Proportionate representation according to the “quotas of contribution, or the number of free inhabitants, as the one or the other may seem best, in different cases,” was to be the rule by which both branches of the Legislature were to be constituted.

The most vital change effected in this plan was that which restored the selection of the members of the second branch to the several states, instead of making it, mathematically speaking, a mere function of the first branch. In opposition to the proposed plan, a resolution was introduced by Dickinson, “that members of the second branch of the National Legislature should be chosen by the individual legislatures,” and it was unanimously passed on June 7th. (1 Ell. Deb. 165.) It is interesting to note that James Wilson, one of the greatest nationalist leaders, offered as a substitute for this a proposition to district the whole country irrespective of State lines, for the election of senators. His own State, Pennsylvania, alone supported this plan.

We, therefore, find that before the actual controversy as to the proportionate strength of the States in the two Houses had been brought to a head,—and even before it was finally determined whether there should be two houses at all, or only one, as was deemed more fitting in a purely federal Government,—the principle had been established that the members of each House were to be selected by the local authority, either of the people of the several States directly,—as in the case of the First

Branch,—or of the people of the several States through their State Legislatures,—as in the case of the Second Branch. In other words, the propositions,—and there were two of them, as above set forth,—that one branch of the National Legislature should be chosen by a power external to the States, was almost unanimously repelled before the real contest commenced, and such a proposition was never renewed in the Convention. Consequently, thus far at least, the Convention was practically unanimous, to the effect that the *suffrage of the States*, whether it was to be equal or proportionate, *was, and could only be* in fact, *the votes cast in the National Legislature by persons freely elected in their respective States, either by the electors qualified under the State-law to vote at their own elections, or by the Legislatures created by and depending upon the people of the States alone for their actual existence.* No suggestion that the States' electorate ought to be interfered with by an outside power when choosing representatives in *either branch* of Congress was ever made in the Convention of 1787, except to be almost unanimously defeated.

The motion of Gouverneur Morris for establishing the qualification of being freeholders, to entitle persons to vote for members of the House of Representatives, produced an interesting debate. (5 Ell. Deb. 385.) Delaware alone supported it. The nationalists, or some of them, thought that the people could be well represented only by the country squires and "yeomen." Dickinson thought likewise. The plan of the draft Constitution, giving the suffrage to the most numerous body of electors constituted by the several States, was advocated as the more popular by James Wilson, Oliver Ellsworth, George Mason, Pierce Butler, Benjamin Franklin, and John Rutledge,—a mixed aggregation of nationalists and federalists. There was never more than a scattering support for the idea of limiting the franchise for the

lower House; and *any limitation on the franchise established by the States for their Legislatures, who were to select the Senators, seems never to have entered the mind of a single delegate.*

When the framers of the Constitution employed the term "suffrage of the states" they must have known perfectly what they meant, for the reason that they were themselves exercising the suffrage of their States in the Convention itself. The "suffrage of the states" was also perfectly familiar through the fact that it was enjoyed and exercised by the States in the body known as "The United States in Congress assembled," which was the official title of the Congress of the Confederation. Of course the same rule had prevailed in the two Continental Congresses. The term "suffrage," instead of "representation," obviously signified the number of votes to which the State was entitled in these respective bodies, irrespective of the number of delegates whom she might see fit to send to represent her. The number of these delegates was not fixed. To the Convention Maryland sent four, New York sent three, Pennsylvania sent eight, and Delaware sent five, and the other States sent varying numbers. Nevertheless, in the Convention, as in the Congress at that time, and in all previous Congresses, each State enjoyed one vote notwithstanding the size of its representation.

It was then definitely settled, as early as the 7th of June, 1787, upon John Dickinson's motion, that *the suffrage in the Senate should be the votes cast by "members to be chosen by the individual legislatures;"* which was the identical method under which the delegates from the several States to the Convention itself were selected, and also the method employed in selecting the delegates to the Congress of the Confederation, and before that time to the first and second Continental Congresses.

It is apparent that the phrase "suffrage of the States in the Senate," had already acquired a definite meaning. It clearly signified the votes cast by persons *chosen under the authority of the States themselves* and could not have referred to senators selected,—according to the Virginia plan, or the elaborate draft constitution of Charles Pinckney,—by the House of Representatives. (See 1st Elliott Deb., pages 143-145). Nor could it have been applied to senators chosen by senatorial districts, as proposed by Wilson. (1st Elliott Deb., 156.) All these plans had been voted down before any question of the numerical value of the voting power of the States was taken up at all and before the phrase "suffrage of the States" was placed in the Constitution.

As to the provision for the qualification of electors of the House of Representatives, there was only the one controversy above mentioned. The existing provision of the Constitution was contained in the document that purports to be Pinckney's draft (1st Elliott Deb., 145), in which Article 3 commences as follows:

"The members of the House of Delegates shall be chosen every — year by the people of the several states; and the qualifications of the electors shall be the same as those of the electors in the several states for their legislatures * * * and vacancies therein shall be supplied by the executive authority of the state in the representation from which they shall happen."

This was practically the only provision in Pinckney's draft by which the States were to participate at all in the structure of the National Government.

c. Contemporary Criticism of the Plan.

There seems to have been, as was natural, a certain amount of loose thinking among members of the Conven-

tion caused by the use of the word "States" in different senses. By some, especially the States Rights men, it was used in the sense of the state governments. By others it was used in the sense of the people of the states as organized communities. The proposition to refer the Constitution itself for ratification to conventions of the people in the several states was resented by some of the advocates of a confederate form of government, including Luther Martin. He used the same argument in his letter (1st Elliott Deb., page 387) that is noticed by Chief Justice MARSHALL in *McCulloch vs. Maryland* (supra), where he says, 4 Wheat., p. 404:

"It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves."

In this passage Chief Justice MARSHALL plainly uses the phrase "state sovereignties" in the sense of "state governments," and the word "states" in the same sense. It is hardly to be contended, however, that the term "suffrage of the states in the Senate" is to be taken to mean "suffrage of the state governments." As Luther Martin points out, in criticizing the Senate as being, after all, in his opinion, no real safeguard to the "states" against federal encroachment (1st Elliott, p. 360), the senators once elected by the legislatures were not subject to recall, and yet if they were delegates of the state governments, or as was later said "ambassadors from the sovereign states," the right of recall would have been an absolutely necessary condition. Curiously

enough, the Virginia plan for the election of members of the lower house provided that they should be subject to recall (1st Elliott, p. 143, Resolution No. 4).

The true answer to Luther Martin's criticism is, of course this, that the Government was not strictly national or strictly federal in any of its branches. It had a combination of the features of these two forms which pervaded every part. The House of Representatives is not strictly a national house of commons, because every state, no matter how small or insignificant, is to have at least one representative, thus producing an inequality not to be justified on strictly nationalist grounds. (A further practical inequality always exists, due to the fact there can be no common divisor for the State populations.) This inequality is even more marked in the electoral college where the smallest states cannot enjoy less than three votes. Another curious fact is that when there is no election by the electoral college and the election is thrown into the House of Representatives, where the states have very unequal representation, the ancient equality of suffrage among the states suddenly revives and the vote is given by states; but even then it is confined to the three highest candidates voted for by the electors.

Obviously also, the fact that the members of the House are elected within the states by electorates created by the states themselves, and not by any national electorate, which does not exist, proves that the House possesses a character essentially federal, notwithstanding the predominating national consideration in the apportionment of its members.

As to the Senate, the absence of the right of recall must be due primarily to a desire, for national purposes, to keep this body independent of sudden bursts of popular

fancy and passion and to secure the stability of the general government for national ends. It was also feared that the states might at any time abolish the national government by refusing to elect senators and thus render it impotent. This fear is referred to by Chief Justice MARSHALL in *Cohens vs. Virginia* (6 Wheaton 289):

“But should no appeal be made to force, the states can put an end to the government by refusing to act; they have only not to elect senators and it expires without a struggle.”

And at page 390:

“It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the Senate will not, on that account, be the less capable of performing all its functions.”

See also Federalist No. 59, p. 274.

The provision for the six-year term of senators, with biennial renewals of one-third of the membership, was deemed a practical provision preventing any possible combination of states from conspiring to put an end to the federal government by the refusal to elect senators. It was impossible to reduce the membership below a quorum competent to do business, without a conspiracy so far-reaching, and so extended in point of time, that it would practically amount to a general upheaval against the Constitution itself; and it was recognized, by none more fully than by Chief Justice MARSHALL himself, that whenever such an upheaval took place the government would be at an end (*Cohens vs. Virginia*, supra).

So that the absence of any provision for the recall of senators, criticized by Luther Martin from the purely federalist, or States Rights, point of view, is not a valid

criticism when applied to a constitution that is admittedly national as well as federal in its nature. Luther Martin's objection was to the national nature of the Constitution, which he feared would enable the ambition and selfishness of the great and powerful states like Virginia, Pennsylvania and Massachusetts to encroach upon and obliterate the liberties of their smaller neighbors. Against a nationalism that was based on the national sentiments of the people, co-operating through their states and not upon the lust of domination, Luther Martin never showed any opposition, any more than did Dickinson, or Read, or Johnson of Connecticut, or Paterson of New Jersey. Martin criticizes the compromise by which the larger states were to preponderate in the House of Representatives, while conceding an equality in the Senate, as a mere agreement on the part of a strong man who had both his feet on the neck of his enemy to take one of them off while keeping the other on. (1st Elliott, p. 360.) In this he plainly falls into the error above noted of confusing the state governments with their people, who are the nation, though they act only within their states.

These criticisms, actually made in the Convention itself by the representatives of the minority, or small states, show conclusively that the subject of *what constituted the suffrage of the states*, both in the House of Representatives and in the Senate, was most thoroughly argued, debated and considered. It was only after it had been definitely settled just what the suffrage in the Senate should be; how the senators should be chosen; what was to be their term of office; whether they were to be dependent upon their constituency or independent of it during that term; whether they were to be required to voice the sentiments of their constituents or of the legislatures that chose them, or their own sentiments;—all these ques-

tions had been considered and determined, and the Senate had been created in the shape in which it existed up to the adoption of the 17th Amendment, *before* the proviso was added to Article V to the effect that by no amendment to the Constitution could any state be deprived, without its consent, *of its equal suffrage in the Senate.*

Madison, in addressing the Virginia Convention, said:

“When we come to the Senate, its members are elected by the States in their equal and *political* capacity. But had the government been completely consolidated the Senate would have been chosen by the people in their individual capacity.” (3 Ell. Deb. 94.)

He means, of course, if Wilson’s plan to elect them by districts had been adopted. And below he speaks of three-fourths of “the States” adopting amendments.

Ellsworth, in moving that the rule of suffrage in the second branch be equal as under the confederation, said:

“To the eastward, he was sure that Massachusetts was the only State that would listen to a proposition for excluding the States *as equal political societies* from an equal voice in both branches.” (5 Ell. Deb. 260.)

The expression “*as equal political societies*,” means more than an equal number of senators.

On page 263 he said:

“The power is given to the few to save them from being destroyed by the many.”

On page 270 *Luther Martin* spoke of it as “equal sovereignty.”

After the heated debate, when everything was voted down and everything went awry, the committee appointed to compromise reported:

"That in the Second Branch, *each State shall have an equal vote.*" (1 Ell. Deb. 194, 206.)

The final draft was mere change of phraseology, so this shows (if it were not self-evident) that suffrage means the "vote" of the State.

Iredell said in the North Carolina Convention:

"and *in order that no consolidation should take place* it is provided that no State shall by any amendment or alteration be ever deprived of an equal suffrage in the Senate without its consent." (4 Ell. Deb. 177.)

As consolidation can come about with two senators remaining, say by national mass vote referendum, *Iredell* must have thought that the guarantee meant more than just "two senators each."

Charles Cotesworth Pinckney said in the South Carolina Convention:

"the Senate will be elected by the State Legislatures and represent the States in their *political capacity.*" (4 Ell. Deb. 304.)

Charles Pinckney (delegate to the National Convention) said in the South Carolina Convention:

"With us the sovereignty of the Union is in the people." * * * "I trust that when we proceed to review the system by sections, it will be found to contain all these necessary provisions and restrictions, which while they enable the general government to guard and protect our common rights as a nation to restore to us those blessings of commerce and mutual confidence which have been so long re-

moved and impaired, *will secure to us those rights which, as the citizens of a State, will make us happy and content at home—as the citizens of the Union respectable abroad.*" * * *

Then, after discussing the House as representing the people:

"here too, the States, whose existence as such we have often heard predicated as precarious, will find, in the Senate the guards of their rights as *political associations.*"

That, of course, does not mean the acts of individual senators which he was not discussing, but the structure of the Senate which as part of the whole he *was* discussing.

Continuing:

"On them (I mean the State systems) rests the general fabric; on their foundation is this magnificent structure of freedom erected, each depending upon, supporting and protecting the other," (he means the Federal part and State part), "nor—so intimate is the connection—can the one be removed without prostrating the other in ruin; like the head and the body,—separate them and they die." (4 Ell. Deb. 328, 330.)

d. Meaning of the Proviso as Applied to Plan.

The suffrage of the states in the Congress of the Confederation, and in the Convention, with which they were familiar, had already been changed materially in its nature. Although the legislatures were to elect the senators, the time and manner of their doing so were placed under the control of Congress (Art. I, Sec. 4). Once elected, the senators were to be paid by the United States, and were wholly absolved from state power or control. Their responsibility was political only. How much more

vital did it become that that responsibility be not taken away by any interference with their constituency, the people who elected the legislatures who were to elect them.

Nowhere in the debates of the Convention was it questioned that the suffrage of the states in the Senate must be their vote, cast by representatives selected through the internal power of the states themselves exercised internally, though under rules that Congress might prescribe for its exercise. No body dreamed, of course, that it could mean anything else. Controversy raged for months over the question of whether the vote of the states should be equal or not, but there never was room for controversy that, whether equal or not, it should be the vote of the states respectively, and not of an electorate imposed upon the states by some outside power. The two propositions that eliminated the electorate of the states, as we have seen, were thrown out of court before the controversy as to equality had even commenced.

Curtis, in his History of the Constitution (Vol. II, page 124), summarizes the controversy as follows:

*"The minority (Ct., N. Y., N. J., Del. and generally Md.) * * * said that the smaller states * * * could not surrender their liberties to the keeping of a majority of the people inhabiting all the states, for such a power would inevitably destroy the state constitutions. They were willing, they said, to enlarge the powers of the federal government; willing to provide for it the means of compelling obedience to its laws; willing to hazard much for the general welfare. But they could not consent to place the very existence of their local governments, with all their capacity to protect the distinct interests of the people, and all their peculiar fitness for the administration of local concerns, at the mercy of great communities, whose policy might overshadow and whose power might destroy them.*

"To the claim of political equality as between a citizen of the largest and a citizen of the smallest state in the Union, they opposed the doctrine, that in his own state every citizen is equal with every other, and holds such rights and liberties, *and so much political power as the state may see fit to bestow upon him*; but that, when separate states enter into political relations with each other for their common benefit, *it is among the states themselves that the equality must prevail.*"

And again, on page 139 and 140:

"*It was settled and conceded that the states, as political societies, must be preserved; and if they were to be represented as corporations, or as so many separate aggregates of individuals, they must be received into the representation on an equal footing, or according to their relative weight. An inquiry into their relative wealth must have involved the question, as to five of them at least, whether their slaves were to be counted as part of that wealth. No satisfactory decision of this naked question could have been had.* * * * [It is fortunate that this was so.] * * * Two courses only remained. The basis of representation in the Senate must either be found in the number of people inhabiting the states, creating an unequal representation, *or the people of each state, regarded as one, and as equal with the people of every other state, must be represented by the same number of voices and votes.* The former was the plan insisted on by the friends and advocates of the 'national' system; the *latter was the great object* on which the minority now rallied all their strength."

Again, in reviewing the actual results of the great compromise, the same author says, on page 166:

"That the final concession of this point (equality of suffrage in the Senate) was a wise and fortunate determination there can be no doubt. * * * They looked at it, in the first instance, as the means of

securing the acceptance of the Constitution by all the states and thus of preventing the evils of a partial confederacy. They probably did not at once anticipate the benefits to be derived from giving to a majority of the states a check upon the legislative power of a majority of the whole people of the United States. Complicated as this check is, *it both recognizes and preserves the residuary sovereignty of the states*; it enables them to hold the general government within its constitutional sphere of action; *and it is in fact the only expedient that could have been successfully adopted, to preserve the state governments, and to avoid the otherwise inevitable alternative of conferring on the general government plenary legislative power upon all subjects."*

In reviewing the subject of the suffrage of the states in the Senate, the authors of the "Federalist" speak with scarcely disguised spleen, which is not to be wondered at, as both Madison and Hamilton were among the most intense opponents of the equality guaranteed to the states. Nevertheless, Madison says, that the proviso in Article V is: "*A palladium to the residuary sovereignty of the states, implied and secured by that principle of representation in one branch of the legislature.*"

"Federalist," No. 43, p. 204.

The significance of this is not to be overlooked, when it is remembered that the "Federalist" is the collection of the ablest and most convincing arguments given to the people of the United States in favor of the ratification of the Constitution in the days when its fate hung in the balance. With that guarantee of equality in the Senate,—"*the palladium,*" as they unquestionably viewed it, of their existence, and their immunity from the political and economic annihilation that they dreaded,—the small states accepted the Constitution. Those states who had led the battle for this equality, threatening in no un-

certain terms to secede from the Convention and make a constitution impossible, if it was not granted, unanimously and without delay ratified the Constitution with this unchangeable principle of equality in the Senate.

Is it believable, in the light of all this history, that the proviso in the Fifth Article means no more than a bare numerical equality of representatives hailing from the different states, no matter how they may be chosen, or no matter what powers they may be permitted to exercise?

The Senate in which this equality was granted was one of the branches of the national legislature in which by Article I "all legislative powers herein granted shall be vested." It was that branch the concurrence of two-thirds of which was necessary for the ratification of treaties. It was that branch which alone had the power to try impeachments. It was that branch whose advice and consent were necessary to the ratification of all presidential appointments, not otherwise provided for by law. It was granted, together with the House of Representatives, the power by a two-thirds vote to override the presidential veto. It was granted by a similar vote, in concurrence with the House of Representatives, the power to propose amendments to the Constitution of the United States. These are the specific powers which it was understood the Senate should possess at the time that the small states insisted upon an equality of suffrage in that body. Would they have insisted so strenuously for equality of suffrage in a body that was not thus an essential part of the national legislature?

This Court has said, through Mr. Justice BREWER:

"If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if

the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, *it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety.* It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is * * * the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

Kansas vs. Colorado, 206 U. S. 46, 91.

e. Examples of Proposed Violations of Proviso.

We frequently hear the proposition of a constitutional amendment providing for a national referendum on acts of Congress. Nothing of the kind, of course, was dreamed of by the framers of the Constitution, but if it had been, what would have been the attitude of the small states toward it? It is only necessary to read the debates in the Convention or Luther Martin's letter to give answer.

If the vote of mere electors, or as we generally say "voters," in New York and Pennsylvania could override the vote of United States senators from Delaware and Maryland, upon the passage of any bill, what would equality of suffrage in the Senate amount to? It is as clear as day that a national referendum by which state lines would be broken down and the people as a whole "thrown into hotchpot" and called upon to vote for or against acts of Congress, which would be passed if they approved, and defeated if they disapproved, would be in

utter violation of the Fifth Article, and would annihilate the equality of suffrage in the Senate, which is the fundamental condition of the existence of the Constitution of the United States.

It is also inconceivable that any amendment to the Constitution conferring the selection of senators,—as was proposed in the Virginia plan and in the Pinckney draft (if the same be genuine),—upon some power such as the House of Representatives,—or, say, the President of the United States,—external to the states themselves, would not equally violate the guaranty to the States of their equal suffrage in the Senate. If the President or the House were to select the senators, even though required, as in the alleged Pinckney plan, to select residents of the states from which they were named, yet they could not by any stretch of language be deemed to be the senators of those states or to exercise what the Convention understood by the phrase, “the suffrage of the states.” The very meaning of the word “suffrage” or the word “vote” signifies the expression of the will of the person or body whose suffrage or whose vote is referred to. The will of the state or of the people of the state can be expressed, and their vote can only be cast, by a representative whom *they* have chosen,—not by a representative whom somebody else outside of that community has chosen, and whom they have no power either to select or instruct.

We, therefore, say confidently, and we challenge our opponents to deny it, *that the suffrage of the state in the Senate means the vote or votes cast in the Senate by senators chosen by the state to represent it.* Whatever latitude there may be as to the *method* which may be prescribed for the election or choice of such senators by the state, yet that election and that choice must be the free act, at whatever time and in whatever manner it takes

place, of the existing body or community that is designated by the word "state."

f. The State Must Be Capable of Consenting.

There is another feature of the proviso of the Fifth Article which is essential to its interpretation and that is the word "consent." "*No state, without its consent, shall be deprived,*" and so forth.. This necessarily supposes that the state, by some means, is capable as a body of consenting, or dissenting, to such proposition as may be placed before it. In order to express consent or dissent on the part of the state, it is necessary, either that the people shall vote directly upon the proposition, through a plebiscite or referendum, or that they shall vote indirectly through their representatives, whether in state legislatures or in conventions. In any case the vote of the people through the qualified electors, under the election laws *existing or adopted by* the state, is indispensable to the expression of the state's consent or dissent. Again we challenge our opponents to deny this proposition.

It is, therefore, plain that the suffrage in the Senate that is guaranteed to the states is guaranteed to them as communities capable, through popular election, of voicing their consent or of refusing their consent. However much a state government's powers of residuary sovereignty may, by amendment to the Constitution, be curtailed, yet it is absolutely clear that the state can not be deprived of the means of *expressing* its own will, whether that will be allowed to prevail or not. The question raised by any amendment interfering with the suffrage is not a question of state supremacy. It is not a question of the extent of a state's power. *It is simply a question whether a state's voice may be choked or stifled by rendering it impossible to express its sentiments at all.*

An individual may be precluded by tyrannical power from expressing his views and beliefs; he may defy such power and suffer the consequences; but if an American state is not allowed to open its polls in an election to such of its own people as constitute its electorate, there is no means on earth for that state to express its corporate views or desires.

“In order to form a more perfect union and secure the blessings of liberty” the people of the United States had no idea of suppressing the voice of the several communities of which the Union was composed. Even the ultra-nationalist plans of Madison and Pinckney did not propose anything of this kind. They left the states unequal, it is true, in voting strength, but yet free by representatives freely elected by their own qualified electors, to utter their sentiments and vote as the people of those states would desire, in the House of Representatives of the Union.

g. Election of Senators Committed to States.

When the election of senators was definitely committed to the states, through such legislatures as they might establish and select, and through such voters as they might qualify, and the suffrage of the states in the Senate was guaranteed until they severally should consent to surrender it, the principle was anchored into the Constitution for all time, that the *votes and voices of the states, as self-constituted and free constituencies*, could never be taken away or suppressed, by any amendment to the Constitution not unanimously ratified.

Obviously, the 17th Amendment, merely simplifying the procedure in the selection of senators by the people of the several states, and eliminating the *indirect* feature of this procedure, neither deprived the states of their

suffrage nor of their power of consenting or dissenting to future amendments that might have that effect.

Possibly the relation of a state's internal suffrage to its suffrage in the Senate was not so plainly manifest before the adoption of the 17th Amendment, which throws that relation into bold relief. In no other way does it affect the case.

3. **THE NINETEENTH AMENDMENT VIOLATES THE PROVISIO,
AND SO EXCEEDS THE EXPRESS LIMITS OF
THE AMENDING POWER.**

I. Effect of the Amendment.

The Amendment reads as follows:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

“Congress shall have power to enforce this article by appropriate legislation.”

The language is copied *verbatim* from the 15th Amendment, down to the essential word “sex,” which takes the place of the phrase, “race, color or previous condition of servitude” in the earlier measure. In the case of the 15th Amendment it has been held that one of the effects of this language was to strike out the word “white” wherever it appeared in a State Constitution as one of the qualifications for suffrage.

Myers vs. Anderson, 238 U. S. 368.

It is contended with reason by our opponents that this Amendment must be so construed as to strike out the word “male” wherever it occurs in such qualifications.

But it has also been repeatedly held that the 15th Amendment does not confer the suffrage on anybody.

The States alone do that. The Amendment merely prescribes that in conferring it they must not discriminate "on account of" race, colour, etc. *Guinn vs. U. S.*, 238 U. S. 347. They may impose educational or other qualifications that only an insignificant minority of their coloured citizens could meet. Many of them do this at present. The suffrage is not conferred upon such persons.

The 19th Amendment, however, forbids discrimination "*on account of sex*." Wherever living beings exist in a state of society there are two sexes. No qualifications for suffrage could be devised that under this Amendment would not admit women and men on a footing of substantial equality.

When a distinction so universally pervasive and so regardless of age, race, colour, creed, nationality, education, intelligence, wealth or poverty, inheritance, social station, or any conceivable differentiation among classes is abolished the inevitable effect of abolishing the distinction is *to confer* the vote, as by an affirmative act, on the sex heretofore deprived of it.

We submit that this Court could not say of the 19th Amendment, as they said of the 15th, "It does not confer the suffrage on women."

If in the year 1870 the suffrage in certain states had been limited, as it was in 1789, to *free holders*, the operation of the 15th Amendment in those states would have been negligible. Probably not half of one per cent. of the former slave population would have been qualified.

The universality of application of the word "sex" as contrasted with the almost single case of the negro race with which the 15th Amendment was intended to deal,

makes the effect of the one so different from the other, that if this Court were to say, "*The 19th Amendment does not confer the suffrage on women*," the average man, be he lawyer or layman, would gasp at the statement. Such a holding by this Court would be a refinement of subtlety that could scarcely be reconciled with sincerity.

We must, therefore, assume that the 19th Amendment does, not incidentally, or "measurably," as the late Chief Justice WHITE said in the *Guinn* case (238 U. S. at 363), but *inevitably*, confer on women, who did not previously possess the right of suffrage, that right and burden. In every male suffrage state,—whatever the existing qualifications, such as educational, or "understanding," tests, ancestry, property or the payment of taxes, in addition to residence, sanity, age and non-conviction of crime,—the body of voters, or of those entitled to register and vote, is substantially doubled.

The right of suffrage previously possessed only by qualified male citizens has been *diluted to half strength*.

No enforcing legislation by Congress is required to accomplish this. The amendment does it of its own force. It re-makes—re-constitutes—every State in the Union, that has not already by voluntary internal act re-made itself, *into a state governed equally by male and female votes*. It abolishes a distinction in political power that has been since the world began.

II. Operation of an Amendment Restricting Suffrage.

If, instead of extending the right of voting to persons who never possessed it before, the Amendment actually forbade its exercise by those who did possess it under the laws of their States, we submit that the invalidity of such a measure would be so patent that no argument could be framed to sustain it.

Suppose an amendment providing that *only* Roman Catholics, or *only* Protestants, or *only* persons with estates worth \$10,000, or *only* wage-earners, should vote.

If every member of this Court would not at once concede that such a measure would deprive the State of its suffrage in the Senate, and of its power to consent or dissent to amendments, and vest both the suffrage and the power in a *fraction* of the State, when the Constitution guarantees it to the *entire* State, then we would confess our inability to place a meaning on plain words.

An amendment depriving a part of "the people of the State who compose the State" (*Lane Co. vs. Oregon*, 7 Wall. 71; *Texas vs. White*, *ibid.* 700) of their right to elect Senators, would be repugnant to Article V, or else language fails.

We say no more on this head, for "much insistence robs truth of her dignity."

III. Operation of an Amendment Enlarging or Conferring Suffrage.

We submit that as to such measures, including the 19th Amendment, the effect is the same. The source of power in the State is changed without the action and regardless of the will of the people of the State. As Daniel Webster argued in *Luther vs. Borden*, 7 How. 1, 30:

"the qualification which entitles a man to vote must be prescribed by previous laws."

A break in the continuity of title to political power in any State occurs only through revolution, or invasion by some foreign or external power. These methods, as Webster points out, are alien to constitutional government and are "wide of the American track."

If political power could be conferred by amendment of the Federal Constitution it would *only* be because the people of the several States in ratifying that instrument had delegated the power to confer it on others without the consent of the existing political powers in each State. But they have not done so. On the contrary they have said that to take away or to change the vote of the then existing States in the Senate the consent of those States is indispensable. That consent can be expressly granted *only* through the action of the existing political powers, i. e., the qualified voters of the State. Those voters remain the sole legitimate source of power till by their legal action under the forms of their own Constitution, or at least by such internal action as their own constituted authorities and especially their Courts recognize as having such effect, their powers have been extended to others.

In other words, a State can amend its own Constitution and so extend the suffrage to women. In such case their title to political power in valid, and the new State is but a continuation of the old.

But if a mob within, or a powerful government without, a State, undertakes to amend the State Constitution to the same effect, the title of the new voters to the power so conferred is not derived from their State, but from an overriding force. The "suffrage of the State in the Senate" henceforward is the suffrage (in part at least) of persons not authorized by the State as previously constituted and existing to vote at all, and the "vote and voice" of the State have been merged in a new "sovereignty," that is not legitimate nor in any true sense sovereign at all.

IV. The Settled Law of Corporations Forbids Enlarging the Suffrage,
Against the Corporate Will.

We need not rest on *a priori* reasoning as in the preceding paragraph, because the law on the subject has long been settled by this Court and others.

Whatever a State is, whether sovereign or not, incontestably it is a corporation.

Ordinary corporations, whether public or private, are the creatures of legislative power, and in the absence of constitutional protection might be changed, re-made, re-constructed or abolished by the power that created them.

In general, public corporations are subject to almost any change the legislature may see fit to impose upon them. No federal question is ordinarily involved in amending or in repealing a municipal charter. The power of electing city officials may be entirely taken from the citizens, or from some of the citizens. Unless the State Constitution forbids, such legislation is valid.

The same would hold true of private corporations of all kinds, except only for these restraints:

- a. The Contract Clause of the United States Constitution;
- b. The "due process" or "law of the land" or "special law" provisions of State Constitutions;
- c. The 14th Amendment.

In the case of *Dartmouth College vs. Woodward*, 4 Wheat. 518, 652, it was held by this Court that a charter granted by the British Crown to a private institution by which it was incorporated and its management vested in

a self-perpetuating board of twelve trustees, each member of which had an equal vote, was a *contract*, though an executed one, and as such it would be impaired by legislation that did not directly deprive those trustees of their votes, but that *enlarged the board*, and *conferred upon others* not chosen by the board itself, and without the board's consent, an equal vote and voice in the corporate management.

The prohibition thus violated was against "impairing the obligation of the contract" which created the self-perpetuating and self-governing body.

The prohibition is precisely the same in effect as the prohibition relied on in this case.

Granting, for the sake of argument, that in the absence of the proviso in Article V, the amending power is broad enough entirely to reconstruct or even abolish a State, just as an unrestrained legislative power could reconstruct or abolish any corporation, yet we find the amending power expressly restrained from depriving any State, without its consent, of its equal suffrage in the Senate.

"Its consent" means the consent of the State, i. e., of a corporation, which can, as all corporations, act only by its agents. Those agents are primarily the *voters* (stockholders, members, contributors, trustees, or whosoever by the charter or by-laws adopted in pursuance of the charter, have the right to vote) and secondarily, the directors or managers who are chosen by the voters to carry out their will, unless as in the case of such an institution as Dartmouth the *voters* and *directors* are the same.

If the consent of a private corporation is indispensable to an act that would force its voting *members* to share

their power with others, because otherwise the chartered existence of the corporation may be indirectly abolished, how much more is the consent of a State whose suffrage in the Senate may not be taken from her without her consent necessary to a precisely similar measure?

And the same rule has been laid down in regard to the deprivation of property otherwise than by the *law of the land*. The voting power of members of a corporation, even if that power is not coupled with any beneficial interest in the voter, but is a trust for eleemosynary purposes, may not be vested by legislative fiat in others than those who derive their power under the original act of incorporation, without violating not only the contract clause, but the 29th Chapter of Magna Charta, that forbids deprivation of property save by "lawful judgment of one's peers or the law of the land."

Brown vs. Hummel, 6 Pa. St. 86.

In a recent criticism of the *Dartmouth College Case* by Prof. A. W. Scott, 34 Harvard Law Review, p. 7, it is pointed out that the State Court was clearly in error in not having held the attempted amendment of the college charter void as conflicting with the provision in the Bill of Rights of New Hampshire forbidding the deprivation of property unless by the "law of the land," and that since the adoption of the 14th Amendment it would have been wholly unnecessary to resort to the "contract" clause to raise a federal question as the "due process" clause of that amendment was clearly violated. He cites many authorities in support of this view, among which we mention *Sage vs. Dillard*, 15 B. Mon. (Ky.) 340, 361; *Allen vs. McKean*, 1 Sumn. 276, 305, cited in *Bryan vs. Board of Education*, 151 U. S. 639; also *Ohio vs. Neff*, 52 Ohio St. 375, 40 N. E. 720 (1895), and *Regents vs. Williams*, 9 Gill & Johns. (Md.) 365.

In the Kentucky case, and in the case in *Sumner*, decided by Mr. Justice Story, the power to amend was expressly reserved, yet it was held that this *did not include the power to add to the number of voting members or trustees*, and so change the control of the corporation *without the corporate assent*. Both cases were cited with approval by this Court.

In the Ohio case the management of a college was conferred upon the governing board of the University of Cincinnati, another institution, and this, although the Legislature had expressly reserved a power of "amending" the charter of the college, was held to be void as a violation of the right of private property belonging to the college and secured by the State Constitution.

In the Maryland case it was held that a change by Act of the Legislature of the controlling power of a corporation without its assent, was not only an impairment of the contract found in the charter of the institution, but also as being a legislative dissolution or ouster, void as being an attempt by the Legislature to exercise a judicial power, and as an attempted deprivation of property otherwise than by the "law of the land," and also as "opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the social compact."

The last reason has been criticised and surely the others suffice without it. At all events the law is clear, that the *existing rights of a corporation are impaired* by changing the voting or controlling power that governs it and giving that power in whole or in part to others to exercise.

That is sufficient for the decision of this case.

The right of the State as a mere corporation, to be represented equally with other States in the Senate by two Senators, each of whom shall have one vote, is a right that cannot be impaired without the State's consent. Ergo the voting or controlling power within the State under its own laws (which correspond to the corporate charter and by-laws) cannot be conferred upon other natural persons than those which its own laws authorize, because the effect would be to deprive the State as a body corporate of a right of which there is no power to deprive it without its own corporate consent.

V. Summary.

The Nineteenth Amendment does in fact and necessarily confer the right of voting within the State upon persons on whom the State has not conferred it, and it does in fact and necessarily dilute and diminish the right of voting of those upon whom the State has conferred it, and so it changes by the force of external power the control of the State's corporate affairs, including the corporate suffrage belonging to the State in the Senate.

It deprives the State as hitherto constituted and existing of the right to elect any Senators at all.

It deprives the State as hitherto constituted and existing of the power to consent to any amendments of the Constitution whatever.

If either that right of suffrage or that power of consent had been subject to abolition by the Constitution, would Delaware, Connecticut, New Jersey or New York or Maryland have ratified the instrument?

The writers of the "Federalist" (No. 43, p. 204), who proclaimed to the people that the proviso was "*probably intended as a palladium to the residuary sovereignty of*

the States, implied and secured by that principle of representation in one branch of the Legislature (i. e., equality of suffrage in the Senate), and was probably insisted on by the States particularly attached to that equality," were, if our opponents are right, guilty either of deliberately misrepresenting the meaning or of wholly misunderstanding the purpose of the clause. Both of them were present, and MADISON, the author of this passage, took active part in the debate upon the adoption of the proviso. He tells us it was "dictated by the circulating murmurs of the smaller States," and that it was agreed to unanimously for that reason (5th Ell. Deb. 551-554). The word "probably" in the quotation is a transparent cloak to conceal the identity of the then anonymous writer, all the proceedings of the convention being veiled in supposed secrecy until over 30 years later.

Maryland by her votes in the convention showed that she was one of the "States particularly attached to that equality."

The late Chief Justice WHITE, speaking for this Court, in *Guinn vs. United States*, 238 U. S. 347, says:

"Without the possession of which power" (i. e., the power over suffrage which has belonged to those governments—the State governments—from the beginning) "*the whole fabric upon which the division of State and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the State would fall to the ground.*"

If this Court has held that the power over suffrage is necessary to "support" the organization and the authority of the State as well as the nation, how can it be that the one right which is by express prohibition made inalienable without the State's consent would not be im-

paired by abolishing or impairing that power without which the State can have neither organization nor authority?

The most manifest of the errors committed by the Court below consisted, we submit, in the refusal of the following prayers:

PETITIONERS' SECOND PRAYER.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is in conflict with the proviso contained in Article V of the Constitution of the United States.

PETITIONERS' THIRD PRAYER.

The Court rules as matter of law that a State's suffrage in the Senate means the votes cast in the Senate by Senators elected in the State by the people thereof, through Electors, who possess the qualifications of Electors of the most numerous branch of the State's Legislature, which qualifications are prescribed and determined by the State in its Constitution or laws, and any purported amendment to the Federal Constitution which nullifies, substitutes or alters the qualifications of such Electors so prescribed and determined by the State, so as to confer the power of electing Senators upon persons on whom the State has not conferred it, or to deny, diminish or dilute such power in the persons upon whom the State has conferred it, operates to deprive the State of its suffrage in the Senate, and that the alleged Nineteenth Amendment would so operate.

PETITIONERS' FOURTH PRAYER.

The Court rules as a matter of law that the consent of a State to such changes in the Federal Constitution as by the provisions of Article V require such consent, can only be expressed, whether directly or indirectly, through the voice of the majority of those persons upon whom it has conferred through its Con-

stitution and laws the power to vote, and that any measure which confers such power upon other and different persons, or denies, diminishes or dilutes such power in those upon whom the State has conferred it, deprives the State of its power by any means to consent to such changes or amendments, and is inconsistent with the proviso contained in Article V of the Constitution of the United States; and that the alleged Nineteenth Amendment is such a measure."

**4. THE FIFTEENTH AMENDMENT AND DECISIONS THERE-
UNDER DO NOT GOVERN THIS CASE.**

The Maryland Court of Appeals held (pp. 152-156) that the 19th Amendment was impossible to distinguish in principle from the 15th, and that this Court had rendered a number of decisions based on the assumption that the 15th Amendment was valid, though without ever deciding that question directly, and hence the Maryland Court held it was constrained to find that the 19th Amendment was within the amending power. No opinion was expressed either upon the general limits of that power or upon the meaning and effect of the proviso or express limitation thereof.

a. Consent Has Validated 15th Amendment.

The proviso in Article V reads as follows:

"Provided that no State without its consent shall be deprived of its equal suffrage in the Senate."

This has been construed by this Court as "a permanent and unalterable exception to the power of amendment" (*Dodge vs. Woolsey*, 18 How. 331, 348), and as "excluding any amendment which will deprive any State, without its consent, of its equal suffrage in the Senate" (*Dillon vs. Gloss*, dec. May 16, 1921, 41 S. C. Rep. 510, 512). We have been able to find no other passages where this Court has construed it.

Obviously it follows that if a State consent to be deprived by Constitutional amendment of its equal suffrage in the Senate, such an amendment would not of necessity be invalid in that State. Such amendments may, therefore, acquire validity by consent, which they would not have without it.

If, therefore, the 15th Amendment was consented to by all the States, notwithstanding it might have deprived some of them of their suffrage in the Senate, it would not be obnoxious to the proviso on that ground. Nor would it constitute any precedent whatever for sustaining another amendment however similar in language that had not been consented to by certain states.

The Court of Appeals of Maryland totally ignored this ground of distinction.

Again, it may be said that the objection to an amendment as operating so as to deprive a State without its consent of its suffrage in the Senate should be raised by or on behalf of the non-consenting State or its citizens directly and not in any mere collateral proceeding, and that until the question is so presented the prohibition of discrimination between various classes of citizens in regard to the right of suffrage cannot be held judicially to deprive the State itself of its suffrage in the Senate.

No case ever came before this Court in which the validity of the 15th Amendment was challenged until 45 years after its adoption had been proclaimed and accepted by all the States. Then in the case of *Myers vs. Anderson* (238 U. S. 368) its construction was questioned, it being urged that it could not apply to purely municipal or even State elections, because if so applied it would be void. This case could not possibly, however, have directly involved the election of United States

Senators, arising as it did solely upon certain provisions of the charter of the City of Annapolis.

All other cases in this Court involving the 15th Amendment have been criminal or penal proceedings in which either the collateral effect of the amendment on State laws using the term "qualified voter" was to be construed (as *Neal vs. Delaware*, 103 U. S. 370), or in which State officials were indicted or sued for violation of an Act of Congress (R. S. 5508, etc) in refusing to receive or count the votes of certain coloured citizens (as *U. S. vs. Reese*, 92 U. S. 214; *Guinn vs. U. S.*, 238 U. S. 347; *U. S. vs. Mosley*, ib. 383).

The Maryland Court was in error in ignoring the objections raised to the 19th Amendment on the score that the State of Maryland had refused to consent thereto, because this Court has never ruled, in effect or otherwise, either that consent to such an amendment is not essential to its validity or that consent was not presumptively granted to the 15th Amendment, in any case where its validity could be questioned for lack thereof.

The Maryland Court misunderstood the clear distinction between amendments such as an amendment which might have attempted to empower Congress to forbid the slave trade prior to 1808, or the 16th Amendment if adopted prior to that year, either of which would have been void *ab initio*, because forbidden absolutely, and amendments affecting a State's suffrage in the Senate which are *only void in the absence of consent*, and whose invalidity may at any time be cured by such consent.

At this date, or at the date (1914) at which *Guinn vs. U. S.* and *Myers vs. Anderson*, supra, were decided, there remains or remained no shadow of doubt that every state in the union had long accepted and acquiesced in the 15th

Amendment as one of the fundamental measures of reconstruction of the Union and the States growing out of the Civil War. In regard to any other matter whatsoever requiring consent in law, so long a period of uniform acquiescence gives rise to an irrebuttable presumption that consent has been obtained.

This is altogether different from any latitudinarian doctrine that the Constitution can be amended by acquiescence in its violation, or that a sort of statute of limitations runs in favor of unconstitutional laws or amendments. Our opponents have hitherto failed to grasp, as they have failed to answer, our contention in this regard.

No citizen of any State has brought any action, or been made defendant in any action, that ever reached this Court, in which he claimed that the 15th Amendment was void because his State had not consented thereto.

The question has, therefore, never been before this Court in regard to the 15th Amendment at all. If it should ever be raised the answer is plain that the universal acceptance of any *fait accompli* by the States and their people must give rise to the presumption that they have given to that legal fact their validating consent.

It should never be forgotten that the Southern States which were in rebellion were first compelled to establish irrevocable negro suffrage in their State Constitutions and then to "consent" to and "ratify" the Fifteenth Amendment. They did, in fact, thus formally "consent" to it, as part of the terms of Peace and Reconstruction, stipulated by Congressional Act, as the condition to, and price of, resuming their representation in Senate and House. While the few remaining States in the North

which had rejected it acquiesced therein and permitted their negro citizens to vote thereunder without contest for more than 40 years. The interference with their "suffrage in the Senate" thereby, was "consented" to, in one way or another, by every one of the States of the Union.

This does not violate, but conforms to the terms of the "perpetual guarantee." The proviso itself expressly permits any State to "consent" to an amendment interfering with its suffrage in the Senate.

Acquiescence will not ordinarily make good a violation of the Constitution or prescription make an unconstitutional law valid.

But that is not what we are dealing with here. Here "consent" expressly prevents it from being a violation and expressly makes it legal within the State so consenting.

Such "consent" can reasonably be *implied* from formal submission to the command of an amendment and implicit obelience to its terms for nearly two generations.

After permitting the negro to vote in Maryland for 40 and odd elections neither Maryland nor any of her citizens could be heard to say that Maryland had not "consented" to the Fifteenth Amendment.

In *Myers vs. Anderson*, 238 U. S. 368, the Supreme Court rightly ignored that claim (if indeed it was directly made) and assumed the amendment valid, referring to the fact that the Court of Appeals of Maryland itself had come to recognize its validity in Maryland.

The "consent" of particular states necessarily and rightly implied from long continued acquiescence in an

amendment affecting their "suffrage in the Senate" is totally different from making an illegal amendment legal by prescription, or from applying a rule of limitations to a Constitutional violation.

**b. The Conditions Under Which Reconstruction Was Accomplished
After the Civil War Removed the Question of Consent
From the Realm of Judicial Decision.**

This argument has also been misunderstood by the Maryland Court which saw in it only an attempt to show that measures enacted in a time of violence and excitement must not be deemed to establish precedents to be followed in times of peace and quiet. The question is far more fundamental.

However duress may be held to avoid individual contracts it is emphatically true that it is no defence against the enforcement of the obligations of sovereign States. The Treaty of Versailles is in the eyes of international law fully as binding upon Germany as any ordinary treaty of commerce and amity entered into by her in times of peace.

While there could be no treaty of peace between the Union and the Confederate States or any of them, the substance of a treaty was enacted in three articles of Amendment of the Constitution, settling for all time the questions which caused or which grew out of the Civil War.

Slaughter House Cases, 16 Wall. 36, 67, 77.

See also "The Government of the United States," by Prof. W. B. Munro (Harv.), p. 68, and "Marse Henry" by Henry Waterson, Vol. I., p. 183.

The consent of the seceding States was exacted by Congress to these amendments as a condition precedent

to their readmission to full membership in the Union. Until this consent was granted by the States and acknowledged by the Congress, they were deprived of any representation in the Senate or the House either, and for most of the time were kept under military rule. Their suffrage in the Senate was entirely taken away, and by military rule their power to consent was reduced to a mere formal act in obedience to compelling force. As to them it was unquestionably true that "*inter arma silent leges.*"

The "consent" yielded by the seceding States to the so-called War Amendments was as conclusive upon this Court, however, as the inevitable result of a great war, as if it had been spontaneously granted by free legislatures in times of peace.

The apparent logical difficulty of applying the same reasoning to the border States of Delaware, Maryland, Kentucky and Tennessee and the distant States of California and Oregon, all of which rejected the Fifteenth Amendment, only exists to those who blind their eyes to the cardinal facts of the situation. There is no shadow of doubt that the same power which ruled with an iron rod eleven States during the decade following Appomattox would never have hesitated to apply the same coercive power to little Delaware, or to the other border States, one of which had actually passed an ordinance of secession, and the other two of which had been openly sympathetic with the Confederate cause. Nor would the distance, or the peculiar racial problems of the new commonwealths on the Pacific have protected them, had they done more than merely refuse to ratify the amendment, from the strength of the victorious government, backed by a majority whose watchword was "*thorough.*"

Vis major does not always need the roar of guns to establish its will. It was not necessary to try the patience of the victors by open defiance in order to prove at the cost of bloodshed that the acquiescence of many States in negro suffrage was extorted only by fear.

c. Example in Creation of West Virginia.

To take a quite parallel case. The Constitution forbids Congress to erect a new State out of part of any existing State without the consent of the Legislature of the latter. Yet the State of West Virginia was erected without any consent whatever of the real Legislature of Virginia, the only one that the people of Virginia had chosen. The body called into being by a purely voluntary convention of Union sympathizers at Wheeling and which met at Alexandria under the protection of the Federal Army, while the assembly chosen regularly under the provisions of Virginia's Constitution was sitting at Richmond, the State capital, in the free exercise of its functions, was not recognized by the Congress itself as the Legislature of the State, after the surrender of the Confederate forces, nor were the Senators which it then elected permitted to take their seats. Yet it had been held competent by Congress to sanction the dismemberment of the commonwealth and to cede to a new State one-third the territory of the old.

The analogy would be apparent should anyone now deny in this Court West Virginia's statehood on the ground that the Constitution was clearly violated by the Act of Congress in admitting her to the Union.

Though Congress has the power to determine which of two contesting claimants is the genuine State government (*Luther vs. Borden*, 7 How. 1), can we picture Congress in times of peace recognizing such a body as

the Alexandria assembly as the real legislature of Virginia?

For a graphic description of the event we refer to Blaine's "Twenty Years of Congress," Vol. I, pp. 457, 460, 464.

Thaddeus Stevens said he did not desire to be understood as "sharing the delusion that we are admitting West Virginia in pursuance of any provision of the Constitution." He based the act on the "laws of war" alone.

This is perhaps the most striking instance of the futility of requiring formal consent in order to validate acts accomplished during a war and bearing on the conduct of the struggle or seeking to settle the issues which it decides.

d. Violence No Substitute Method of Amending Constitution, But Its Effects Are Not Subject to Judicial Inquiry.

Violence is not a third substitute for the two methods provided in the Constitution for its own amendment—far from it. But when the question of the consent of States to an amendment, which with such consent is unquestionably valid, is raised, and the fact appears that such States and all their people after refusal to ratify simply acquiesced in the amendment as adopted without their votes, and made their whole policy as to elections and general legislation conform to the amendment without any further protest whatever, due to the fact that such protest would be unheeded or for any other cause, then it is too late to question *in foro legis* the fact of their consent. The absence of protest or resistance on their part is amply explained by the fear that governed their conduct. It is this failure to protest under such circumstances, which we contend should not be used as

a precedent to prove that protests against more or less similar measures in other times and under other conditions, must be held judicially unavailing.

e. **Essential Difference Between Race and Sex Discrimination.**

i. *Race Problems National in Scope.*

In addition to the distinctions between the cases arising under the 15th and 19th Amendments, due to the question of the non-consent of the State being directly raised in the latter and never being raised or having been entirely precluded by circumstances or the logic of events in the case of the former amendment, we submit there is an essential distinction between the two measures themselves that renders the difference in their operation one of kind and not merely of degree, so that one cannot justly be deemed a precedent for the other.

This distinction consists in the fact that discrimination on account of race, color or previous condition of servitude is unquestionably class discrimination, and the very kind of class discrimination which had in the opinion of many produced the Civil War. Furthermore it is, juridically if not ethnologically, a purely arbitrary discrimination, related to the problem of self-government only in that it excludes from participation therein as a class of human beings, large numbers of the citizens or inhabitants whose right to a voice in their government is considered by many to be quite as clear in a free republic as that of the members of the dominant race.

Race problems had always been matters of national concern. The problem of the Indians was dealt with in the original Constitution by turning it over entirely to the Federal Government, notwithstanding many of the tribes dwelt wholly within the confines of certain States. The phrase "wards of the nation" early applied to the

Indians was readily transferred to the freedmen after the Civil War, as their condition was distinctly analogous. It was the Union that had conferred upon them their freedom and civil rights, and it was for the Union to protect them in their enjoyment. The method selected differed widely from that used in solving the Indian problem. With the wisdom of neither method are we concerned. The principle justifying interference by national power is the root of the matter.

It is very generally true that racial problems cannot be confined in their effects even to national boundaries, much less to the boundaries between States so closely related as the members of the Union. Many racial discriminations, such as those affecting the Jews, greatly concerned the makers of the Treaty of Versailles, and some of them were prohibited to the smaller nations that then were brought into being. Their political autonomy and independence were not deemed to have been materially impaired by such prohibitions.

Between such prohibitions and those contained in the Fifteenth Amendment there is a difference only in degree. For the sake of the peace of the Union, and for the welfare of the subject race which the power of the Union had enfranchised, the States were forbidden to discriminate against them in regard to suffrage.

The negro race had already been made citizens by the Fourteenth Amendment, and whatever may be said of that measure it is not claimed that of itself it affected the senatorial suffrage or right of consent of any State. It forbade discrimination in regard to civil rights between any persons, meaning especially between white persons and negroes, but not mentioning the latter except as included in the words "any persons" or "all

citizens." The Fifteenth Amendment dealing with suffrage and seeking only to remove the class discrimination which had clearly become a national problem could only accomplish this purpose by use of the words "race, colour or previous condition of servitude," which would clearly designate the class to be protected.

ii. *Sex Discrimination Not a National Problem.*

The Fourteenth Amendment, by the use of the words "all citizens" and "any persons," included under its equal protection all sexes and ages as well as races. It was early decided in *Strauder vs. West Virginia* (100 U. S. 303), that a State statute excluding negroes from service on juries was obnoxious to the amendment as denying to that race the equal protection of the laws. It might perhaps have been held, had the case arisen, that a State law excluding persons of certain religious faiths from juries would be void for the same reason. Such are the kinds of discriminations that the national power may be legitimately concerned in preventing.

But it is equally certain that neither the exclusion of women from juries nor the exclusion of minors is in any sense a denial to women or to minors of the equal protection of the laws. Why this should be so, though the amendment protects both women and minors from deprivation of their property without due process of law, is a logical puzzle only to those who blind their eyes to the cardinal difference between racial, religious or class discriminations and those that being based on age, sex, or even physical and mental capacity as such, are not class discriminations at all, for they affect all classes equally.

Certainly the Fourteenth Amendment literally construed would avoid all State statutes or unwritten laws imposing disabilities of one kind or another on in-

fants or married women. The fact that many of the latter have been voluntarily removed by the States in no way affects the argument. The fact is that sex and age distinctions are so interwoven in the municipal law of every State or country in the world that their abolition by any external power whatever would be utterly inconsistent with the recognition of any right of autonomy or even civil legislation by the State or nation affected.

iii. *The Nineteenth Amendment Forbids Natural Distinctions Common to Every Code.*

This Court has recently and in the words of the late Chief Justice expressed the basic effect of the Fifteenth Amendment as follows:

"Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning, *and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground.* In fact, the very command of the amendment *recognizes the possession of the general power by the State,* since the amendment seeks to regulate its exercise as to the particular subject with which it deals." (Italics ours.)

Guinn vs. U. S., 238 U. S. 347.

The words we have italicized are an absolute assent by this Court to our principal contentions in this case, that without the control of the suffrage left directly to the people in their several States, where alone, as Chief Justice MARSHALL said they can act at all (*McCulloch vs. Maryland*, 4 Wheat. at p. 402) there is no legiti-

mate source of authority either State or National. The perversion of the authority belonging thus to the people of every State to ends subversive of national harmony by certain class discriminations was forbidden by the Fifteenth Amendment, but the ineradicable authority of the people in their several States to control the suffrage as the root and foundation of all self-government was clearly admitted by the amendment itself.

In just the same way the Fourteenth Amendment clearly recognized the powers of the States to prescribe and enforce all their general municipal law of property, contracts, crimes, domestic relations and everything else therein embraced, subject only to the prohibition of *arbitrary* discriminations. This did not mean sex and age discriminations, for they are *not* arbitrary, but *natural*.

A municipal law that could not take into account differences of age and sex would be imperfect and absurd.

And by the same token an electoral law that cannot take into account such differences will be largely imperfect and absurd.

iv. *Summary.*

The Nineteenth Amendment invades a totally new sphere from the constitutional point of view,—a sphere essentially belonging to municipal law and therefore to the States. It has no relation whatever to any national problem, past, present or future. Women are not the “wards of the Nation.” The family is, however, the foundation of the State and if an arbitrary rule of suffrage is imposed upon the State that may break into and overthrow its whole domestic law it is plain that the State has lost “in a general sense the power over suff-

rage which has belonged to it from the beginning and without the possession of which power * * * both the authority of the Nation and the State would fall to the ground."

Prohibiting race discrimination is a vitally different matter from imposing sexual equality. If any State can be coerced into rewriting its law of property or domestic relations so as to eliminate sex discriminations it has no independence in regard to legislation left. Granting only for the sake of argument that independence in regard to the subjects of ordinary legislation does not really belong to any State as against the amending power under the Constitution, yet it is equally true that if a State can be coerced into eliminating sex discrimination or age discrimination in its suffrage laws it has no independence left in regard to suffrage.

We submit that it is proven, and this Court has already held, that the State's independence in regard to suffrage is the basis of all authority, both State and National, and that the whole fabric of the Constitution rests upon it alone.

The substantial difference then between the Fifteenth and Nineteenth Amendments is that one imposes conditions upon the exercise of the power over suffrage, while the other appropriates the power to itself, imposing upon the State and the Nation an arbitrary rule of sex uniformity from which there can be no relaxation or escape, creating a new electorate or body politic in all male suffrage States, and thus changing or depriving these States of their suffrage in the Senate, and making it impossible for them under their own laws to consent or refuse to consent to this or any other amendment whatever.

One amendment protects the Nation from what was deemed a disruptive perversion of power, the other destroys the State and substitutes for popular sovereignty under the Constitution an unwieldy, irresponsible and impossible scheme of vesting ultimate sovereignty only in two-thirds of Congress and three-fourths of the Legislatures, conceding to these bodies collectively even the power of changing or abolishing the very constituencies that elected them.

II. THE NINETEENTH AMENDMENT HAS NOT BEEN RATIFIED, NOT HAVING RECEIVED THE ASSENT OF THREE-FOURTHS OF THE STATES.

There are two heads of this proposition. The first is that **in fact** the Legislatures of Tennessee and West Virginia did not ratify the Amendment. The second is that even if they had done so their act was without effect **in law**, for neither of them was competent to do so under the law of its creation, and for the same reason the alleged acts of ratification by the Legislatures of Missouri, Texas and Rhode Island were also without effect.

1. Tennessee and West Virginia in Fact Rejected the Amendment.

This proposition depends on the facts proved in this case as hereinbefore set forth ("Statement of the Case," ante, pp. 8-14) which need not be here repeated. These facts include the legal criteria established by decisions in those states to determine the *factum* of the expression of the Legislative will. These decisions and their effect have been discussed and set forth (ante, pp. 11, 13).

We submit that under those facts and decisions if it were a question in any case depending in the Courts of either State, whether its Legislature had passed the resolution of ratification or had defeated it, the decision of

those Courts would be that the resolution had been defeated.

The act of passing the resolution *whatever the source of power to ratify* is an authentic act of the Legislature *et non* according as the established forms required for the performance of that act have been complied with, so far as by the law of the jurisdiction in which the act occurs those forms are essential to its authenticity.

We are dealing not with the power but the authenticity of the act.

In Tennessee it has been established that an act of either House does not and cannot become authentic as long as a motion to reconsider the same, duly entered, has not been duly defeated. In this case it affirmatively appears that reconsideration, so far from being duly defeated, duly prevailed, and that upon such reconsideration the original action was reversed.

If, in the meantime, by the use of political legerdemain, the *unauthentic* act of the House had not been proclaimed as authentic, through a misconstruction of the facts by the Secretary of State of the United States, produced by a misleading and incorrect certificate sent him by the then Governor of Tennessee, we submit that no one would now question the fact that the authentic act of that House had been to defeat the resolution.

If for no other reason than to prevent history being distorted, we submit, this Court should announce that in point of fact Tennessee never ratified.

As to West Virginia the facts are somewhat different and so is the local law. By the local law it appears that the Senate *finally defeated* the resolution of ratification

on March 3rd, 1920. It was, however, prevented by the refusal of the lower House, from adjourning, and when after an interval the two members absent on that date appeared, one of them only being recognized as entitled to a seat, and the other being ousted, the whole matter was brought up again, contrary to the established rules, and by the help of the former absentee who was seated, the resolution was again put to a vote and declared carried.

We have submitted that by the settled law of that State the earlier action of the House was under the circumstances its only authentic action in the premises (ante, p. 12).²

2. The Legislatures of Five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, Were Incompetent to Ratify This Amendment, and Their Ratifications Are Void.

That the 19th Amendment, without conferring the power to grant or withhold suffrage upon the Congress, invades the "local self-government" of every state is self-evident.

It impairs the sovereignty of the people of all the States by depriving them *pro tanto* of the right to decide for themselves who shall govern the States.

In the part of their constitutions known as the "Bill of Rights" the people of Missouri, Rhode Island, West Virginia and Texas have forbidden their legislatures to impair their right of "local self-government" and the people of Tennessee have forbidden the members of their legislature to record the "assent of their State" to any Federal Amendment proposed subsequent to their election.

Note 2.—Vermont's ratification, being by a Legislature elected after proclamation of the Amendment by an electorate recreated by the Amendment itself, must obviously be disregarded, on the general principle that the corporate assent to a reorganization changing the control of the corporation, when necessary, must be given prior to the taking effect of the change, or it is no real assent at all. There are only 35 other ratifications.

The Legislature of Tennessee having been elected before the amendment was proposed by Congress was incompetent.

The Legislatures of Missouri, Rhode Island, West Virginia and Texas were also incompetent, by reason of the express provisions of the law which creates them. These provisions are quoted hereinafter (post, pp. 108-110).

a. THE EXTENT OF THE POWERS OF LEGISLATURES.

When the people of all the States entered the Union they did not surrender to Congress the right to endow incompetent legislatures with "omnipotent" power by simply submitting Federal amendments to them for ratification.

The people did cede to the Congress the right to propose to their "legislatures," the very much restrained representative bodies which "made the laws for the people" such amendments as legislatures were competent to ratify.

But by the alternative method provided in Article V for which there can be no other purpose, the people, in the same sentence reserved to themselves, acting directly in State Conventions (the only way they can act directly in their sovereign capacity, *McCulloch vs. Maryland*, 4 Wheaton 403), the power to ratify Federal amendments as to which the legislatures were not "competent."

(Note, that even the people of three-fourths of the States thus acting directly are "incompetent" to deprive any State without its consent of its equal suffrage in the Senate.)

The people thus adopted the Constitution.

It was the only way they could have adopted it. For as MADISON said (5 Ell. Deb. 355):

"the Legislatures were incompetent to the proposed changes" * * * "it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence."

MASON also agreed with MADISON (5 Ell. Deb. 352). He said:

"The legislatures have no power to ratify it. They are the mere creatures of the State Constitutions and can not be greater than their creators. * * * Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment that this doctrine should be cherished as the basis of free government."

How can anyone suppose that the framers when actually in the very act of following MADISON's and MASON's advice to submit the Constitution to the people themselves acting directly in State Conventions, nevertheless, in the same breath, by Article V, approved the other "novel and dangerous" method and authorized it to be applied at the pleasure of Congress.

If so, then the alternative provided for State Conventions was totally unnecessary.

In view of this it is legally doubtful if any of the 23 Legislatures in the male suffrage States counted as ratifying were competent to so amend the "male clauses" of their State Constitutions. It is legally certain that the Legislatures of Missouri, Rhode Island, West Virginia, Texas and Tennessee were not competent to ratify.

b. HAWKE VS. SMITH DISCUSSED.

All this was self-evident before *Hawke vs. Smith*, 253 U. S. 221.

It is claimed, however, that the Supreme Court in deciding that case changed the source of political power in the United States from the people of the United States to the Congress—turned the whole sovereignty of the people over to their creatures, the State Legislatures, whenever Congress so willed.

On the contrary, all that *Hawke vs. Smith* decided was that a State could not create new agencies for ratification other than those provided in Article V by making the legislature's ratification conditional on its being approved by popular vote.

This Court held that the Legislature or Convention, as proposed by Congress, was designated as the agency to express "*the assent of its State.*" (253 U. S. at 229.)

The Legislature of Ohio was to proceed as before to ratify or reject. It was attempted, however, to add a new machinery (not contemplated by Article V) to comprise part of the act of ratification.

Article V contemplates what it says, "legislatures" restrained as they had always been by the laws of their creation. It does not contemplate "legislatures plus a referendum," nor, on the other hand, "unrestrained, omnipotent" legislatures which had never before existed.

The people were certainly not giving to Congress in Article V the right to endow "incompetent" legislatures with unlimited powers to "unmake" the Constitution which they were not competent to approve.

"The people made the Constitution and the people alone can unmake it." *Cohens vs. Virginia*, 6 Wheaton 389.

No implication can grant such power to Congress. The discretion to "propose" to legislatures does not change the term "legislature" or endow the body so named with new powers. It does not abolish restraints inherent in the very nature of the political agent bearing that name or forming, in America at least, invariably, the limits of its power.

It is true the legislatures derive their power to ratify from Article V such amendments as their people have not prohibited them from ratifying by clauses in their State Constitutions.

But when they come to act on a Congressional proposal each Legislature speaks, not for the people outside its State, *but for its own State and people alone*, otherwise it would record something other than "the assent of its State."

In attempting to override the will of its own people incorporated by them into their organic law it attempts *to turn their refusal into an "assent."*

If Congress can remove, in its discretion, by "proposing" amendments to them, the shackles which the people of a State have imposed upon their Legislature then it is not the "*assent of the State*" which is recorded at all, but the unrestrained individual view of the members of its Legislature, perhaps elected (as 34 Legislatures were here) before the proposal was made by Congress, perhaps called into special session (as 30 Legislatures were here) and utterly lacking a popular mandate.

When the people of a State elect a Legislature on other issues, do they give it blanket authority to disfranchise them, or to dilute their votes by enfranchising others, by means of any Federal amendment to that end, which may be *subsequently* "proposed" by Congress?

The question answers itself, for in that event the people of every State hold all their political rights at the discretion of Congress and omnipotent unrestrained Legislatures.

Congress itself in delegating authority to Legislatures to expend money which it confides to their exclusive care for purposes which it designates has been held to recognize implicitly the complete subjection of those bodies to the people of the States that create them. *Haire vs. Rice*, 204 U. S. 291.

Could the Convention have intended on the contrary to subject the people to their Legislatures?

Yet that is the sole foundation upon which the asserted legality of the 19th Amendment rests.

If so, it completely destroys any residuary sovereignty in the people of the States.

When, on the other hand, the citizen votes for members of a State Convention under the alternative plan provided by Article V, newly called to act in his name upon a Federal amendment necessarily *previously* proposed by Congress, the issue is always direct and certain and the popular mandate complete.

c. RESTRICTIONS ON LEGISLATURES OF THE FIVE STATES.

The provision in the Constitution of Missouri is as follows:

"Article II, Sec. 3. We declare that Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

The provision in the Constitution of Tennessee reads:

"Article II, Sec. 32. No Convention or General Assembly of this State shall act upon any amendment to the Constitution of the United States proposed by Congress to the several States unless such Convention or General Assembly shall have been elected after such amendment is submitted."

The Texas Bill of Rights declares:

"Article I, Sec. 1. Texas is a free and independent State, subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the States.

Sec. 29. To guard against transgressions of the high powers herein delegated we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government and all laws contrary thereto or to the following provisions shall be void."

As the only act of any Texas officials which could impair the right of local self-government of the State of Texas would be the action of the Legislature of the State of Texas in ratifying a Federal amendment having that effect, such action is "excepted out of the general pow-

ers of government," that is, forbidden by Sections 1 and 29 of the Texas Bill of Rights.

The Rhode Island Constitution (1843), says:

"ARTICLE I.

(Preamble to Bill of Rights.)

Declaration of Certain Constitutional Rights and Principles.

In order effectively to secure the religious *and* political freedom established by our venerated ancestors, and to preserve the same for our posterity we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained and preserved and shall be of paramount obligation in all legislative, judicial and executive proceedings."

Sec. I. "In the words of the Father of his country we declare 'that the basis of our political system is the right of the people to make and alter their Constitutions of government, but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all.'"

No action of the Rhode Island Legislature is "competent" to record "an explicit and authentic act of the whole people of Rhode Island" unless Congress in defiance of the people of Rhode Island can give it that competency, in which case it is certainly not "the free and voluntary assent of that State and her people to the 19th Amendment," involving a change in the male suffrage clause of her State Constitution.

The Constitution (1872) of West Virginia says:

"Article I, Sec. 2. The government of the United States is a government of enumerated powers and all powers not delegated to it, nor prohibited to the

States are reserved to the States or to the people thereof.

“Among the powers so reserved to the States is the exclusive regulation of their own internal government and police, and it is the high and solemn duty of the several departments of government created by this Constitution to guard and protect the people of this State from all encroachments upon the rights so reserved.”

If that is not a mandate to the Legislature of West Virginia, which is certainly one of the “several departments of government” of that State, not to vote for a Federal amendment which attacks her “internal government” by taking from her citizens in part the right to choose the voters of that State, it means nothing.

In face of that mandate to the people of West Virginia can anyone contend that the action of the West Virginia Legislature in voting to ratify the 19th Amendment, if in fact it so voted, expressed the free and voluntary “assent of that State” to its enactment. (Especially when her people had in 1916 by a majority of 98,000 defeated woman-suffrage!)

The above five States were among the “male suffrage States” that in each of their constitutions also contained a provision limiting their suffrage to “males.” These provisions were entirely consistent with the Federal Constitution. The members of these five legislatures were all bound, by their official oaths as such, to support and defend their State Constitutions. Nevertheless a majority in each, *as counted*, ignored their official oaths, violated the express provisions above quoted forbidding them to ratify, and sought to amend by indirection the “male” clauses.

d. LEGISLATURES ARE AGENTS OF STATES, NOT OF NATION.

We are dealing here not with the effect of the 19th Amendment if validly enacted, upon State Constitutions which it would of course supplant, but with the "competency," the power, of legislatures validly to record the "assent of their States" thereto.

The assent of a particular State must be the free and voluntary act of the people of that State however much it must conform to the method Article V has fixed.

The "legislature" which acts (however it derives its powers), is still composed of State officials elected, organized and acting in the orderly way prescribed by the Constitution of that State and necessarily subject to all the limitations prescribed therein, limiting its power to meet, prescribing the place of meeting, its dual form of organization, the procedure and all its powers.

In conformity with them, and not otherwise, it must record the "assent or dissent of its State."

If Congress can remove all the State restrictions on its powers and make it omnipotent, then its members are not members of the State Legislature at all, but *Federal officials acting under a Federal power*, and in no sense of the word would they record the "assent of their State" to a proposed amendment. The States as such would cease to take part in amending the Federal Constitution.

e. NO MASS SOVEREIGNTY ABOVE PEOPLE OF THE STATES.

There is no such political concept in this country as the people of the United States in the *aggregate*.

The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the States.

The so-called "National" House of Representatives is elected every second year by "*the people of the several States.*" Const., Art. I, Sec. 2 (see 253 U. S. at 228).

There are but two modes of expressing their sovereign will known to the people of this country. One is by direct vote—the mode adopted by Rhode Island in 1788 when she rejected the Federal Constitution. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now, it is not a matter of opinion or theory or speculation, but a plain undeniable historical *fact*, that there never has been any act or expression of sovereignty in either of these modes by that imaginary community, "the people of the United States in the aggregate."

Usurpations of power by the *Government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole people of the United States in the aggregate to demonstrate its existence as a corporate unit or self-contained political sovereignty.

Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the States as States.

No respectable authority has ever had the hardihood to deny, that, before the adoption of the Federal Constitution the only sovereign political community was the people of each State.

When the Confederation was abandoned and the Constitution was adopted by the people of the several States in their State Conventions the General Government was reorganized, its structure was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the State Governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies.

There was a new *government*, but no new “*sovereign people*” was created or constituted.

The people, in whom alone sovereignty inheres, remained just as they had been before.

MADISON said, in the Virginia Ratification Convention (3 Ell. Deb. 94):

“Who are parties to it? The people—but not the people *as composing one great body*, but the people as composing thirteen sovereignties.”

LEE, of Westmoreland, said (3 Ell. Deb. 180):

“If this were a consolidated government ought it not to be ratified by a majority of the people *as individuals* and not as States?”

CHARLES PINCKNEY, in the South Carolina Convention, said (4 Ell. Deb. 328):

“With us the sovereignty of the *Union* is in the *people*.”

In *McCulloch vs. Maryland*, 4 Wheaton 316, MARSHALL said for the Supreme Court (page 402):

“They (the people) acted upon it in the only manner in which they can act safely, effectively and

wisely on such a subject, by assembling in convention. It is true they assembled in their several States—and where else should they have assembled?"

Then, answering his own question, he conclusively disposes of any idea of a "mass people of the United States," in these words:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States."

Of course it may be denied that there were no such political dreamers then or are not now. But, after all these years, does anyone expect a new ultimate sovereign people—a mass people of America—different from and superior to the "people of the States" who ratified the Constitution, to be now discovered?

Or that the primary sanction upon which MARSHALL based the very supremacy of delegated Federal power, the action of the people of the States in ratifying the Constitution, will now be broken down?

Does anyone expect that legal sanction will now sustain this effort to "break down the lines which separate the States and compound the American people into one common mass" by striking down the restrictions which the only "people of the United States" known to MARSHALL'S Court or hitherto to American history, have placed upon their agents, their "legislatures," to preserve their ultimate sovereignty and self-government?

f. SOVEREIGNTY NOT TRANSFERRED TO AGENTS OF THE
PEOPLE.

It is with the power of the sovereign people of the United States to unmake *their* constitution, establishing *their* Federal Government which they themselves created, that we are dealing here. The question is whether that sovereignty has now been transferred to Congress and omnipotent State legislatures specially endowed by Congress, to the extent of depriving them, the only "people of the United States" who ever existed or can exist, of their inherent right to determine for themselves who shall exercise their sovereignty, who shall govern their States and elect *their* Congressmen and Senators.

If their Congress and legislatures, specially endowed by Congress, determine in whole or in part the suffrage qualifications for the people (and in doing so brush aside the restrictions the "people" in their State Constitutions have placed upon them as their agents),—if these omnipotent agents holding no popular mandate can even disfranchise the people direct, or what is the same thing, indirectly dilute their votes by enfranchising others; then the sovereignty of the people of the United States has become a myth.

This is the inevitable result of making a "scrap of paper" of the provisions of their State Constitutions, inserted by the people of the five States of Texas, Tennessee, Missouri, Rhode Island and West Virginia to protect themselves from this very abuse of power.

This disposes of the claim that the people of the States in ratifying the Constitution ceded away all right to curb or limit the "power" of their agents, the State Legislatures, in ratifying the Federal Amendments, who strange to say (according to the claim) though clothed with om-

nipotent power still remain mere agents of the people of the States for recording the "assent of their States," but assert the right nevertheless to negative the expressed will of their own people.

To whom according to this startling theory could the people of the States have ceded their sovereign rights when they ratified the Constitution?

Not to the mass of people inhabiting the territory embracing all the States, for there was no such community in existence and they took no measures for the organization of such a community. If they had intended to do so the very style "United States," would have been a palpable misnomer, nor would treason have been defined as levying war against *them*.

Not to the Government of the Union, even if Congress, which merely "proposes" to the States, and the legislatures Congressionally endowed with omnipotence by the proposal, can all be construed to be part of the Federal Government for this purpose. For in the United States no sovereignty resides in Government or in its officials.

As Daniel Webster said (Congressional Debates, Vol. IV., Part 1, page 565):

"The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imparts no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

In the Declaration of Independence, in the Articles of Confederation, in the Constitution of the United States, the corner-stone is the inherent and inalienable sovereignty of the people.

To have transferred sovereignty from the people to a government would have been to have fought the battles of the Revolution in vain—not for the freedom and independence of the people of the States, but for a mere change of masters. Such a thought or purpose could not have been in the heads or hearts of those who moulded the Union, who sought by the compact of Union to secure and perpetuate the liberties then possessed. Those who had won at great cost the independence of the people of their respective States were deeply impressed with the value of Union, but they could never have consented to fling away the priceless pearl of the sovereignty of the people of their States for any possible benefit therefrom. And they did not.

The people made the Constitution and the people alone can unmake it.

g. CONCLUSION.

It is therefore submitted that the limitations which the people of Texas, Tennessee, Missouri, Rhode Island and West Virginia put upon their State Legislatures in the organic law of their creation are valid and binding. That those five legislatures were "incompetent" to ratify.

Without them only 32 ratifications have been received. The so-called 19th Amendment, therefore, still remains "a mere proposal without obligation or pretensions to it."

III. CONCLUSION.

There are other points which might be urged against the validity of the 19th Amendment. Some of them have

been dealt with by other counsel in another case pending before this Court, and we do not feel we can profitably add to what has there been said.

These include the effect of Article IV of the Constitution, containing a guaranty to the States of a republican form of government, which means little or nothing if it does not mean self-government, as distinguished from the power of a mob (see *Luther vs. Borden*, 7 How. 1) or the power of a super-sovereignty which, in respect to their right of corporate self-government the people of the several states never intended to create, and as to which right "such supremacy does not exist." (*Collector vs. Day*, supra, p. 32).

Also it is contended with great force that the first ten amendments being contemporary with, and virtually conditional of, popular assent to the Constitution, contain guarantees irrepealable by any Constitutional power, short of the inherent sovereignty of the people of all the several States.

Also, we submit, that the power to amend the Federal Constitution does not include the power to amend State Constitutions in purely local matters, and that even if it does these could not be amended by mere legislatures that are singly incompetent to amend their own. If the Court holds, as we submit it should, that five such States have expressly forbidden their own Legislatures to ratify this particular amendment this point will be unnecessary to be decided, for the amendment itself must then fall to the ground.

We ask again the Court's consideration of all the prayers set out in the Fourth Assignment of Error (Record, pp. 164-8) and its ruling upon them, as they present succinctly what we respectfully submit is the law, upon each point involved in this case.

Although no prayer refers specifically to the cases of Texas and Rhode Island, whose Constitutions were not read to the Court below, yet this Court will notice them judicially, and include them in its opinion upon the matter of the 5th, 8th and 11th Prayers.

We submit that for the reasons given the decision of the Maryland Court of Appeals should be reversed.

Respectfully submitted,

THOMAS F. CADWALADER,

GEORGE ARNOLD FRICK,

WILLIAM L. MARBURY,

For Plaintiffs in Error.

(Appendix attached.)



APPENDIX A.



APPENDIX A.

HISTORY OF THE PROVISOS IN THE 5TH ARTICLE.

5th Ell. Deb. (Madison papers), p. 532.

Sept. 8—*Mr. Rutledge* said that he never would agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property, and prejudiced against it. In order to obviate this objection, these words were added to the proposition:

“Provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the 4th and 5th Sections of the 7th Article.”

As amended, agreed to, 9 to 1; (Del. No.), N. H. divided.

Sept. 15, p. 551—Art. 5 under consideration as above amended—Art 5 (as of Sept. 15, 1787):

“The Congress, whenever two-thirds of both Houses shall deem necessary, or on application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the 1st and 4th clauses in the 9th Section of Article 1.”

Mr. Sherman expressed his fears that three-fourths of the states might be brought to do things fatal to particular states, as abolishing them altogether, or depriving

them of their equality in the Senate. He thought it reasonable that the proviso in favor of the states importing slaves should be extended, so as to provide that no state should be affected in its internal police, or deprived of its equality in the Senate.

Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

Mr. Gouverneur Morris and *Mr. Gerry* moved to amend the article, so as to require a convention on application of two-thirds of the states.

[*Mr. Madison* debated this.]

The motion of G. Morris and Mr. Gerry was agreed to *unm. con.*

Mr. Sherman moved to strike out of Article 5 after "legislatures" the words, "of three-fourths," and so after the word "conventions," leaving future conventions to act in this matter, like the present convention, according to circumstances. On this motion—Massachusetts, Connecticut, New Jersey, aye, 3; Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, No, 7. New Hampshire divided.

Mr. Gerry moved to strike out the words "or by conventions in three-fourths thereof." On which motion—Connecticut, aye, 1; No, 10.

Mr. Sherman moved, according to his idea above expressed, to annex to the Article a further proviso—

“that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate.”

Mr. Madison. Begin with these special provisos, and every state will insist on them, for boundaries, exports, etc.

On the motion of *Mr. Sherman*—Connecticut, New Jersey, Delaware, aye, 3; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, No, 8.

Mr. Sherman then moved to strike out Article 5 altogether. *Mr. Brearly* (N. J.) seconded the motion; on which—Connecticut, New Jersey, aye, 2; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, No, 8; Delaware divided.

Mr. Gouverneur Morris moved to annex a further proviso—

“that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”

This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or, on the question, saying No.

Col. Mason, expressing his discontent at the power given to Congress, by a bare majority, to pass Navigation Acts, which he said would not only enhance the freight, (a consequence he did not so much regard), but would enable a few rich merchants in Philadelphia, New York and Boston, to monopolize the staples of the Southern States and reduce their value perhaps 50 per cent., moved a further proviso—

“that no law in the nature of a Navigation Act be passed before the year 1808, without the consent of two-thirds of each branch of the legislature.”

On which motion—Maryland, Virginia and Georgia, aye, 3; New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina, No, 7; North Carolina absent.

[*Randolph* and *Mason* then expressed their anxiety at the extent of powers given to Congress, and the dangers of tyranny. *Pinckney*, while recognizing imperfections, promised his support. *Gerry* stated his objections and dissent.

On *Randolph's* proposition—

“that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by, another General Convention,”

All the states answered No.

On the question, to agree to the Constitution as amended, all the states, Aye.]

FILED
DEC 3 1921
WM. H. STANSBURY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER ET AL.

against

J. MERCER GARNETT ET AL.

MOTION TO DISMISS WRIT OF ERROR.

ALEXANDER ARMSTRONG,

Attorney-General of the State of Maryland,

LINDSAY C. SPENCER,

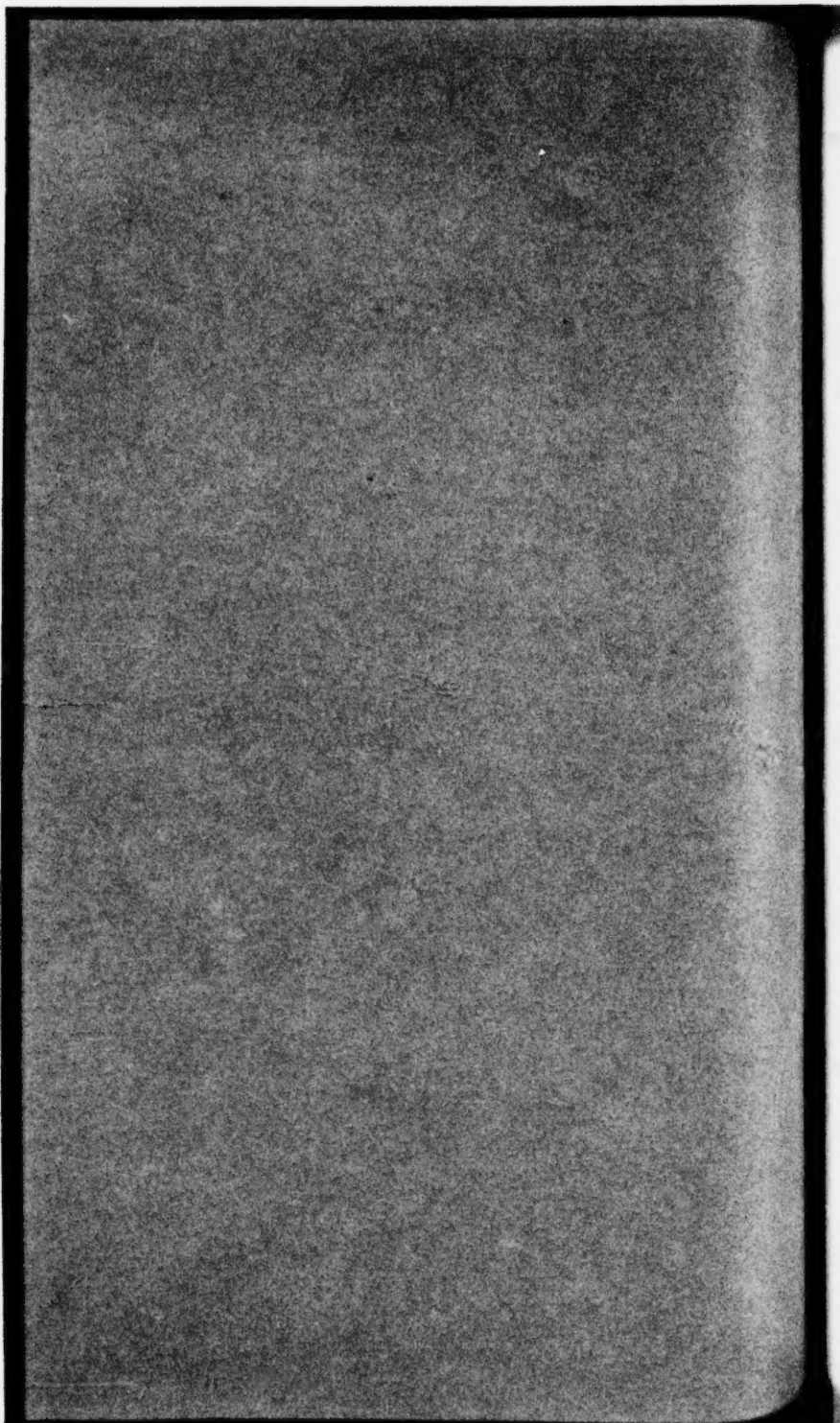
Assistant Attorney-General of the State of Maryland,

GEORGE M. BRADY,

ROGER HOWELL,

JACOB M. MOSES,

For Defendants in Error.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER ET AL.

against

J. MERCER GARNETT ET AL.

MOTION TO DISMISS WRIT OF ERROR.

Now come the defendants in error and respectfully move the Court to dismiss the writ of error filed herein and for cause show:

1. That the Court has no jurisdiction to review by writ of error the decision of the Court of Appeals of Maryland in the above case.

ALEXANDER ARMSTRONG,

Attorney-General of the State of Maryland,

LINDSAY C. SPENCER,

Assistant Attorney-General of the State of Maryland,

GEORGE M. BRADY,

ROGER HOWELL,

JACOB M. MOSES,

For Defendants in Error.

**BRIEF IN SUPPORT OF MOTION TO DISMISS
WRIT OF ERROR.**

STATEMENT OF FACTS.

On October 12, 1920, Oscar Leser, one of the plaintiffs in error, appeared before the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City and made protest against the registration of two women, the defendants in error, Cecilia Street Waters and Mary D. Randolph. The board allowed the registration of the two women, whereupon the plaintiffs in error brought a petition in the Court of Common Pleas of Baltimore City to strike the names of the two women so registered from the books of registration, such action on their part being held authorized under the provisions of Section 25 of Article 33, Code of Public General Laws of Maryland (Leser vs. Garnett, 114 Atl. 840).

The grounds upon which this petition was based were:

(1) That the Constitution of Maryland confines the right of suffrage to males; (2) that the Nineteenth Amendment to the Constitution of the United States, upon the strength of which the board had overruled the protest made to them, was invalid—first, in that it was not such an amendment as the Congress of the United

States is authorized by Article V of the Constitution to propose to the Legislatures of the several States to be by them ratified, and as such was an unconstitutional amendment; second, in that the said Nineteenth Amendment had never in fact been ratified by the Legislatures of three-fourths of the States and had never become a part of the Constitution of the United States.

The Court of Common Pleas on January 28, 1921, filed an opinion holding that the Nineteenth Amendment was valid and had been properly ratified by the required number of States, and dismissing the petition of the plaintiffs in error. On appeal this was affirmed by the Court of Appeals of Maryland (*Leser vs. Garnett*, 114 Atl. 840), and a writ of error to the Supreme Court of the United States was allowed by the Honorable A. Hunter Boyd, Chief Judge.

ARGUMENT.

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW BY WRIT OF ERROR THE DECISION OF THE COURT OF APPEALS OF MARYLAND.

The plaintiffs in error in this case sought, briefly, to have stricken from the list of registered voters of Baltimore City the names of two women, upon the ground that a provision of the State Constitution limiting the right of suffrage to males was valid and that a provision of the United States Constitution, viz., the Nineteenth Amendment, was invalid. The decision of the Court of Appeals of Maryland, which it is sought to have reviewed, was that the provision of the State Constitution in question was invalid, and that the provision of the United States Constitution in question was valid.

No other question outside of the interpretation of the local statutes with respect to the protesting of unqualified voters was at issue; no other question was decided.

It follows that there is presented no one of the cases in which a judgment or decree of the highest court of a State is reviewable by writ of error under Section 709 of the Revised Statutes of the United States. This suit drew in question the validity of a provision of the United States Constitution, and the decision was in favor of its validity. The plaintiffs in error insisted that under the Constitution of Maryland only male citizens were entitled to be registered as voters. The Board of Registry, the defendants in error, Waters and Randolph, and the intervening defendants in error, Roberts et al., admitted this, but claimed that the right to be so registered was extended also to female citizens because of the Nineteenth Amendment to the United States Constitution. Here was clearly a right or privilege claimed by the defendants in error under a statute of the United States within the meaning of Revised Statutes, Section 709; and had the decision of the Court of Appeals of Maryland been adverse to this claim, there could be no doubt of their right to a writ of error to review that decision. Such was not the case. The decision of the Court was in favor of the right asserted by the defendants in error; and the plaintiffs in error, who have set up no Federal right or privilege personal to themselves or their status as citizens, have no right to have the decision reviewed by writ of error.

State of Missouri vs. Audriano, 138 U. S. 496;
34 L. Ed. 1012; 11 Sup. Ct. Rep. 385.

There was further drawn in question the validity of a provision of the State Constitution. The plaintiffs in error claimed that this provision was valid and in force.

The defendants in error claimed that the provision in question was rendered invalid by the Nineteenth Amendment to the Constitution of the United States. Had the Court of Appeals of Maryland upheld the contention of the plaintiffs in error, there would have been clearly a case in which a State statute, questioned on the ground of repugnance to the Federal Constitution, had been upheld by the State court; and there would have been no doubt of the right of the defendants in error to a writ of error to review the decision. The contrary was the case; the decision of the Court of Appeals was against the validity of the provision of the State Constitution as being repugnant to the Constitution of the United States. A writ of error does not lie in such a case.

Commonwealth Bank of Kentucky vs. Griffith,
14 Pet. 56; 10 L. Ed. 352.

The plaintiffs in error also attacked the validity of the Nineteenth Amendment upon the ground that it was never properly ratified by the requisite number of State Legislatures, in that the Legislatures of the States of Missouri and Tennessee were not competent under the provisions of the Constitution of those States and further in that the Legislatures of the States of Tennessee and West Virginia ratified the amendment in violation of their own rules of parliamentary procedure and of the laws and constitutions of those States. The decision of the Maryland Court of Appeals adverse to the contention of the plaintiffs in error manifestly is a decision in favor of the validity of a provision of the Federal Constitution and as such is not subject to review by writ of error.

Moreover, objections to the validity of an enactment of a State Legislature, based upon the ground that such

Legislature was not competent or duly organized, or that such enactment was not enacted as required by the State Constitution, are not reviewable on writ of error by the Supreme Court.

Scott vs. Jones, 5 How. 343, 12 L. Ed. 181.

Atlantic & Gulf Railroad Co. vs. State of Georgia, 98 U. S. 359, 25 L. Ed. 185.

Smith vs. Jennings, 206 U. S. 276, 51 L. Ed. 1061, 27 Sup. Ct. Rep. 610.

Furthermore, the substance of that which the plaintiffs in error sought in this connection with respect to the objections, based upon the Constitutions of the States of Missouri and Tennessee, is that the resolutions of ratification in those two States were invalid as being contrary to the State Constitutions. Such resolutions were "statutes" of those States within the meaning of Section 709, Revised Statutes. (See *Williams vs. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Ross vs. Oregon*, 227 U. S. 150, 57 L. Ed. 458, 33 Sup. Ct. Rep. 220.) The Supreme Court has no authority to declare a State law void under a State Constitution, nor to review a decision by a State Court where the question involved is the conformity of a Statute with a State Constitution. Nor does the alleged error of a State court in construing the law of another State raise a Federal question.

Smith vs. Jennings, 206 U. S. 276, 51 L. Ed. 1061, 27 Sup. Ct. Rep. 610.

Johnson vs. New York Life Insurance Co., 187 U. S. 491, 47 L. Ed. 273, 33 Sup. Ct. Rep. 174.

For the reasons stated, we respectfully submit that this Honorable Court has no jurisdiction to review by writ of error the decision of the Court of Appeals of Maryland

in this case, and that the motion to dismiss the writ of error should accordingly be granted.

Respectfully submitted,

ALEXANDER ARMSTRONG,

Attorney-General of the State of Maryland,

LINDSAY C. SPENCER,

Assistant Attorney-General of the State of Maryland,

GEORGE M. BRADY,

ROGER HOWELL,

JACOB M. MOSES,

For Defendants in Error.

Service of copy of the above motion to dismiss and brief in support thereof admitted this day of November, 1921.



FILED
DEC 31 1921

WM. E. STANLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 333

OSCAR LESNER ET AL.,
PLAINTIFFS IN ERROR

Against

J. MEBBER GARNETT ET AL.,
DEFENDANTS IN ERROR

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND

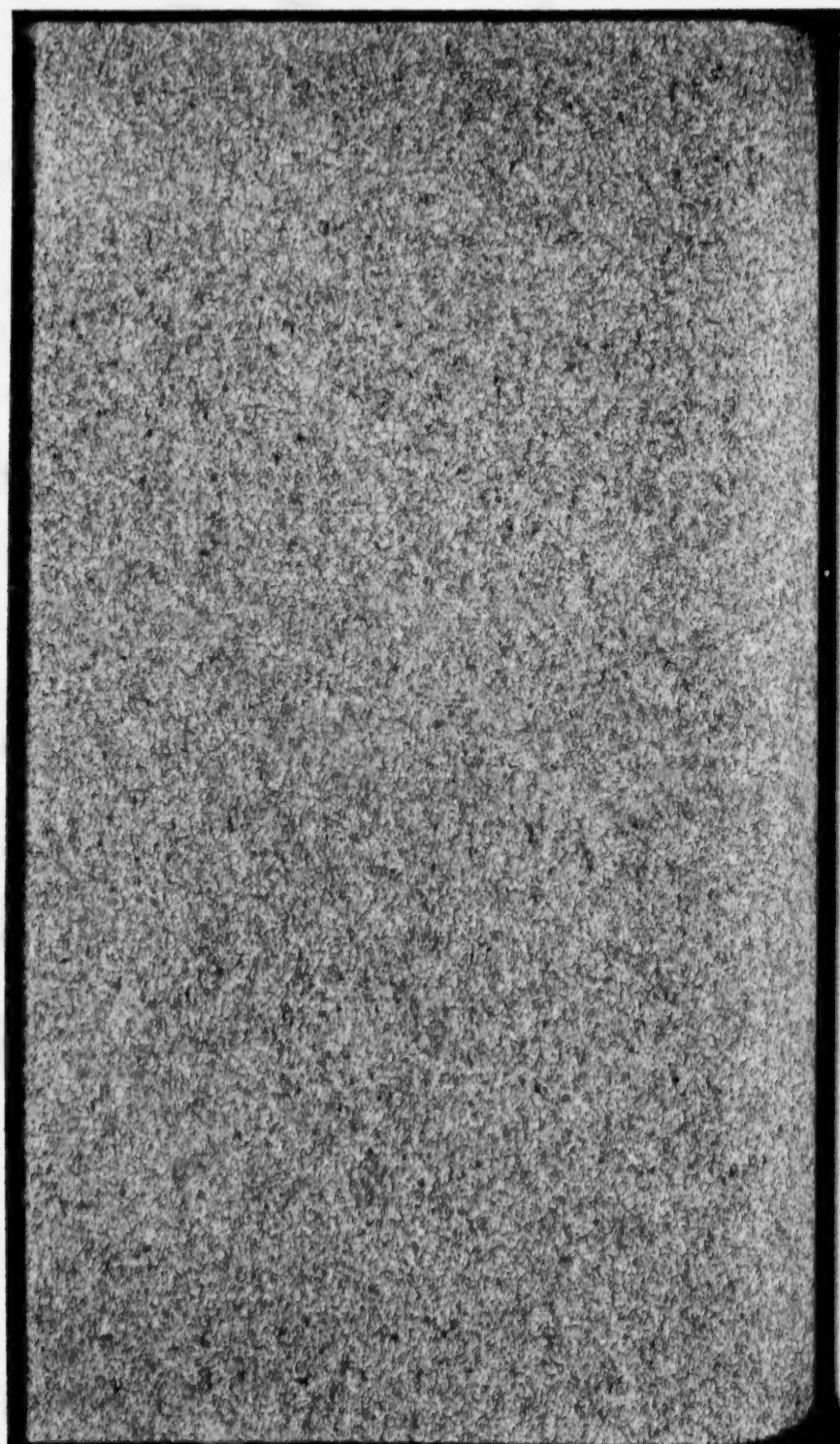
BRIEF FOR DEFENDANTS IN ERROR CAROLINE
ROBERTS, CLARA T. WAITE, JOSEPHINE L.
CHATARD, EUGENIA H. PARKER, MADELINE
LEMOYNE ELLICOTT, A. PAGE REID,
MARGARET T. CAREY, ANNA W.
HEATH, EVELYN F. LORD, ANNIE
JANNEY, MARY W. RAMFY,
AND HATTIE M. EMMERT.

GEORGE MOORE BRADY,
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Caroline Roberts et al.

MALCOLM BRADY, HOWELL & YOST,
JAMES M. MOORE,

Of Counsel,



IN THE
Supreme Court of the United States

OCTOBER TERM, 1921

No. 553

OSCAR LESER ET AL.,
PLAINTIFFS IN ERROR

Against

J. MERCER GARNETT ET AL.,
DEFENDANTS IN ERROR

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT OF
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Of Counsel.



INDEX

	PAGES
INTRODUCTION	2
ARGUMENT	2-53
I. THE OPERATION AND EFFECT OF THE NINETEENTH AMENDMENT	2-4
II. THE NATURE AND EXTENT OF THE AMENDING POWER	4-39
A. THE QUESTION OF IMPLIED RESTRICTIONS..	5-18
1. <i>Existence of Implied Restrictions Negatived by Wording of Article V.</i>	5-6
2. <i>Existence of Implied Restrictions Negatived by Nature and Source of Amending Power</i>	6-12
3. <i>The Nineteenth Amendment is With- in the Meaning of the Word "Amend- ments" as Used in Article V.</i>	12-15
4. <i>The Analogy Between Amending and Tasing Power Is Not Well Founded</i>	15-16
5. <i>The Argument From Consequences of No Validity</i>	16-17
6. <i>Summary</i>	17-18
B. THE QUESTION OF THE EXPRESS LIMITA- TIONS UPON THE AMENDING POWER	18-25
1. <i>The Question of Equal Suffrage in the Senate</i>	18-20
2. <i>The Question of the Alleged Express Restrictions Upon the Amending Power Existing in Other Parts of the Constitution</i>	20-25
(a) <i>No Restriction Contained in Guarantee of Republican Form of Government</i>	20-21
(b) <i>No Restriction Contained in Ninth and Tenth Amendments.</i>	21-25

	PAGES
C. THE QUESTION OF THE FIFTEENTH AMENDMENT	25-35
D. THE EIGHTEENTH AMENDMENT	35-38
E. SUMMARY	39
 III. THE FORMAL AND ACTUAL RATIFICATION OF THE NINETEENTH AMENDMENT	 39-53
A. THE BINDING EFFECT OF THE OFFICIAL CERTIFICATES OF RATIFICATION	40-45
B. THE REQUISITE NUMBER OF STATE LEGISLATURES HAVE IN FACT RATIFIED THE NINETEENTH AMENDMENT IN DUE FORM	45-53
1. <i>The Restrictions In The State Constitutions</i>	45-48
2. <i>The Irregularities In The Ratifying Proceedings</i>	48-53
(a) <i>In Tennessee</i>	48-51
(b) <i>In West Virginia</i>	51-53
 CONCLUSION	 53-55

TABLE OF CASES

	PAGES
Collector vs. Day, 1 Wall, 111.....	15, 37
Dartmouth College vs. Woodward, 4 Wheat, 518.....	20
Davis vs. Hildebrandt, 241 U. S. 565.....	21, 50
Dillon vs. Gloss, 256 U. S. ———.....	2, 6, 8, 12, 46, 50
Field vs. Clark, 143 U. S. 649.....	43
Foster vs. Neilson, 2 Pet. 243.....	40
Georgia vs. Stanton, 6 Wall, 50.....	42
Gibbons vs. Ogden, 9 Wheat, 1.....	19
Guinn vs. United States, 238 U. S. 347.....	3
Haire vs. Rice, 204 U. S. 291.....	47
Harwood vs. Wentworth, 162 U. S. 547.....	44
Hawke vs. Smith, 253 U. S. 221.....	5, 8, 29, 45, 46, 49, 50
Hollingsworth vs. Virginia, 3 Dall, 318.....	49
Jacobson vs. Massachusetts, 197 U. S. 11.....	20
Kansas vs. Colorado, 206 U. S. 46.....	23
Kiernan vs. Portland, 223 U. S. 151.....	21
Kilbourn vs. Thompson, 103 U. S. 168.....	40
Knox vs. Lee, 12 Wall, 457.....	53
Legal Tender Cases, 12 Wall, 457.....	19
Luther vs. Borden, 7 How, 1.....	21, 42, 43
Lyons vs. Woods, 153 U. S. 649.....	44
Martin vs. Hunter's Lessee, 1 Wheat, 304.....	8, 19
Martin vs. Mott, 12 Wheat, 19.....	41, 42
McCulloch vs. Maryland, 4 Wheat, 316.....	8, 47
Mountain Timer Co. vs. Washington, 243 U. S. 219.....	21
Myers vs. Anderson, 238 U. S. 368.....	3
Neal vs. Delaware, 103 U. S. 370.....	3, 30
Norton vs. Shelby County, 118 U. S. 425.....	27
Opinion of the Justices, 118 Me. 544, 107 Atl. 673.....	50
Pacific States Telephone and Telegraph Co. vs. Oregon, 223 U. S. 151.....	21
Rainey vs. United States, 232 U. S. 310.....	52
Rhode Island vs. Palmer, 253 U. S. 350.....	14, 35-38
Slaughter House Cases, 16 Wall, 36.....	17
Smith vs. Mitchell, 69 W. Va. 481.....	52
State of Ohio, ex rel. Erkenbrecker vs. Cox, 257 Fed. 334.....	15, 24, 44
Sturgis vs. Crowninshield, 4 Wheat, 122.....	20
United States vs. Cruikshank, 92 U. S. 542.....	4
United States vs. Mumford, 16 Fed. 223.....	4
United States vs. Reese, 92 U. S. 214.....	4, 30
White vs. Hart, 13 Wall, 646.....	33, 34, 42
Williams vs. Suffolk Ins. Co., 13 Pet. 415.....	40, 45
Yarbrogh, Ex parte, 110 U. S. 651.....	25

CONSTITUTIONS AND STATUTES

UNITED STATES CONSTITUTION

PAGES

Preamble	13
Article I, Section 8	15
Article IV, Section 4	20, 21
Article V	<i>passim</i>

AMENDMENTS

Article IX	21, 25
Article X	21, 25
Article XIII	33
Article XIV	16, 17, 33
Article XV	24, 25, 35
Article XVIII	35, 38
Article XIX	<i>passim</i>

MARYLAND

Acts 1870, page 931, Joint Res., No. 8	29
Acts 1920, Special Session, Chapter 1	31, 32

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Von Holtz, Constitutional Law of the United States	9
Willoughby, Constitutional Law of the United States	34, 50
Willoughby, Nature of the State	7

INTRODUCTION

This is a case brought for the sole purpose of testing the validity of the Nineteenth Amendment to the United States Constitution. Its validity is attacked upon several grounds, which may be arranged in two main groups, as follows:

- (1) That the Amendment is not within the amending power conferred by Article V of the Constitution of the United States.
- (2) That the Amendment has not been formally and properly ratified by the requisite number of State Legislatures.

At the time of trial, 37 States had ratified the Amendment; since then Vermont has also ratified, making 38 in all, or two more than three-fourths of the States. The Court will take judicial notice of the subsequent ratification of Vermont.

Dillon vs. Gloss, 256 U. S. ———, (decided May 16, 1921).

ARGUMENT.

I.—THE OPERATION AND EFFECT OF THE NINETEENTH AMENDMENT.

The Amendment reads as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

It is exactly similar in its general wording to the Fifteenth Amendment, prohibiting the denial or abridgment by the United States or any State, of the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude. It must be interpreted in the same manner as the Fifteenth Amendment; and cannot be regarded as encroaching upon the rights of the several States to administer their internal affairs to any greater extent than did the Fifteenth. The operation and effect of the Fifteenth Amendment was set forth at some length in *Guinn vs. United States*, 238 U. S. 347, 362, by White, C. J. as follows:—

"Beyond doubt the Amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the State would fall to the ground. In fact the very command of the Amendment recognizes the possession of the general power of the State, since the Amendment seeks to regulate the exercise as to the particular subject with which it deals.

"But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify, or deprive the States of their full power as to suffrage except, of course, as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary."

By the self-operating effect of that Amendment, the word "white" in those State Constitutions which limited the suffrage to white male citizens, was stricken therefrom.

Neal vs. Delaware, 103 U. S. 370.

Guinn vs. United States, supra.

Myers vs. Anderson, 238 U. S. 368.

The Nineteenth Amendment must have the same effect with respect to the limitations of suffrage to male citizens. And this is true for all elections, National, State or Municipal, regardless of whether the State in question had ratified the Amendment or not.

Myers vs. Anderson, supra.

As is indicated by the quotation above from *Guinn vs. United States*, no right of suffrage is granted except indirectly; the States and the United States are merely forbidden to *discriminate* against citizens of the United States, in extending the right to vote, on account of sex.

United States vs. Reese, 92 U. S. 214.

United States vs. Cruikshank, 92 U. S. 542.

This was concisely summed up in the latter case in the following words:

"The right of suffrage is not a necessary attribute of national citizenship; but exception from discrimination in the exercise of that right on account of race, etc., is, the right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

No additional power is given to the Federal government to interfere with the right of local self-government in the States, with the exception that Congress may legislate concerning State and Municipal elections *strictly* for the purpose of preventing the prohibited discrimination.

United States vs. Mumford, 16 Fed. 220.

II.—THE NATURE AND EXTENT OF THE AMENDING POWER.

Is the Nineteenth Amendment such an amendment as Congress may not propose or the State Legislatures ratify? Is it by its nature beyond the amending power under the Constitution of the United States? To answer this question it is essential that the nature and extent of the amending power—the most fundamental power existing in any political society, the power which Calhoun aptly termed the *vis medicatrix* of our entire system of government—be examined into and that determination be made as to what, if any, limits may exist upon its exercise.

The language of Article V is broad and general in its terms. It reads as follows:—

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions

in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The article stands as a recognition on the part of the framers of the Constitution that the instrument of which they were the authors might in the course of time and under different conditions require changes; and that it was requisite that a mode for effecting these should be provided.

The Federalist, No. 43.

Hauke vs. Smith, 253 U. S. 221, 226.

It is, however, contended in the present case that such changes are restricted in kind and character; and that the Nineteenth Amendment falls without the limits prescribed by the Constitution. This contention sees two classes of restrictions upon the character of proposed amendments, viz., an implied restriction that no amendment can constitutionally operate to work a fundamental transformation in the nature of our system of government; and express restrictions contained in the Article itself,—of which at this time there is the one only that no State may without its consent be deprived of its equal suffrage in the Senate—as well as other provisions of the Constitution claimed to act as such express restrictions. Within both these classes, it is contended, the Nineteenth Amendment falls.

A.—THE QUESTION OF IMPLIED RESTRICTIONS.

I.—EXISTENCE OF IMPLIED RESTRICTIONS NEGATED BY WORDING OF ARTICLE V.

We respectfully submit that the existence of implied restrictions upon the amending power is negated at the very outset by the wording of Article V itself. It is very apparent that the Article makes no effort whatsoever to define the character of the amendments that might be proposed and ratified, beyond the express limitations that are there set forth. Those restrictions upon the amending power were the specific ones

which the Constitutional Convention deemed necessary to exclude from the power of Congress to propose to the legislatures of the several States or to Conventions therein. The very fact of their incorporation into the Article as express exceptions from the amending power constitutes a negation upon the existence of others; for it follows immediately that the framers of the Constitution, by reason of the very fact that they deemed it necessary expressly to prohibit such an amendment as, for instance, the depriving any State of its equal suffrage in the Senate, must necessarily have contemplated the possibility of the extension of the amending power to such a subject unless provision to the contrary were made. They thought it necessary to make express provision against such an exercise of the power, and thereby recognized that no implied restriction existed as against it. It is impossible to infer an intention that any other limitations upon the character of amendments that might be proposed and adopted, other than those named in the Constitution itself, should exist, solely by implication.

Frierson, Amending the Constitution of the United States, 33 Harvard Law Review, 659.

And in the recent case of *Dillon vs. Gloss*, 256 U. S.—(decided May 16, 1921), this Court said:—

"An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it *subjects this power to only two restrictions*: one that the proposal shall have the approval of two thirds of both Houses, and the other excluding any amendment which will deprive any State without its consent, of its equal suffrage in the Senate." (Italics ours.)

2.—EVIDENCE OF IMPLIED RESTRICTIONS NEGATED BY NATURE AND SOURCE OF AMENDING POWER.

But even without this, it is further submitted that no implied limitations upon the amending power can be read into the Constitution and this by virtue of the nature and source of the amending power itself.

"There is", says a great apostle of States' Rights, "a higher power,—placed above all by the consent of all,—the creating

and preserving power of the system—to be exercised by three-fourths of the States,—and which under the character of the amending power, can modify the whole system at pleasure,—and to the acts of which none can object.”

Calhoun, The South Carolina Exposition (Works of Calhoun, Ed. Cralle, Vol. VI, p. 50).

It is an axiom of political science that in every politically organized community entitled to be called a State there exists an authority to which from the legal point of view, all interests are potentially subject. It is the repository, so to speak of the supreme will of the State; and the entire body of laws, public and private, as they exist at any one time, are but the expression of this supreme will in so far as it has found expression. It is the ultimate and sole source of all laws for the State, and being so, there can be no legal restrictions upon it except those which are self-set. By constitutional provisions, this authority can provide for the governmental organization of the State, and apportion various rights and powers among the various parts of that organization. This apportionment it may change at will, for there is no higher power above it. It has created for itself a certain form in accordance with which its machinery shall function; but being itself the creative power, it can not bind itself by its own creation, except in so far as it may consent thereto.

“The limitations upon State action set by law are obviously merely formal in character. They are self-set by the State and the same power which has decreed them still has the power to alter or abolish them, though this alteration or abolishment must be done in the formal and legal way.”

Willoughby, The Nature of the State, p. 214.

If the supreme will of the State, the ultimate law making power, desires to change the apportionment of governmental powers as laid down in the Constitution of the State, there is no legal restraint upon it. It is itself the source of law while the instrument which it has adopted to delimit the powers of its governmental machinery is merely the expression of its sovereign desire at any one time. Restrictions may indeed be implied under that instrument for or against the exercise of

certain powers granted to governmental organs; but none can be implied thereunder as against the exercise by the ultimate authority of the State itself, by virtue of its sovereign prerogative, of its right to change or modify at will the distribution of governmental powers, which it has formerly adopted, in the manner which it has itself prescribed. It can create and, therefore, in the prescribed manner and subject to an orderly process it can change, abolish, or re-create at pleasure.

In this country, the ultimate source of authority, the power which ordained the Constitution and which can therefore change it, is stated in the Preamble—the People of the United States.

Martin vs. Hunter's Lessee, 1 Wheat. 304, 324.

McCulloch vs. Maryland, 4 Wheat. 316, 403.

Hawke vs. Smith, 253 U. S. 221, 226.

Dillon vs. Gloss, 256 U. S. — (Decided May 16, 1921)

By the Constitution they made a certain apportionment of governmental powers and vested some thereof in the National Government and others in the Governments of the several States. Those powers so apportioned were hedged about with various restrictions, some express, some, perhaps, implied; beyond those restrictions the governmental agencies exercising those powers could not venture. In addition the sovereign power which so created the Constitution and adopted such a distribution of governmental powers, provided a way in which the provisions of the instrument created by it could be changed. As to one certain kind of change it provided that only after a certain time could it be made; as to another kind, it provided that only in one certain way could it be made; as to all others it provided the means by which they should be brought about.

To say that by virtue of having established a certain kind of governmental organization, the sovereign power thereby impliedly divested itself of its right to make fundamental changes therein is to say nothing less than that it divested itself of the sovereignty inherent in it. It is confusion between the sovereign power itself and the government which is the instrument of the sovereign power. Sovereignty is indefeasible and inalienable; and cannot pass from the body politic so long as the latter exists.

Jamieson, Constitutional Conventions, p. 20.

Lieber, Political Ethics, Vol. I, p. 250.

"The sovereign people—did not, in adopting the Constitution, leave the stage, but they can at any instant use again, to the fullest extent, their sovereignty."

Von Holtz, The Constitutional Law of the United States, Sec. 15.

And when the sovereign power has acted, in the manner which it has prescribed for itself, to change the distribution of its governmental powers, no limit to the extent of the change which it so makes can be implied from the fact that such a change affects fundamentally the nature of the government.

"It has at times been alleged that no amendment in violation of the 'spirit' of the Constitution or providing for a change in the essential nature of the American State would be valid. The argument in support of this view rests, however, upon a conception of the Constitution as a contract between the States."

Willoughby, The Constitutional Law of the United States, Vol. I, p. 521.

The most notable and forceful exponent of a construction of the Constitution as a contract between independent sovereign States was John C. Calhoun; so that since, as indicated above, the argument, that implied restrictions should be read into the Constitution against the right to make a change in the essential nature of the distribution of governmental powers, rests upon such a construction, his views upon the nature and extent of the amending power are of particular interest and weight. And Calhoun repeatedly, throughout his political writings, asserts a doctrine of the absolute supremacy of the amending power under Article V, and its absolute ability to work any and all changes in the distribution of the power of government.

Works of Calhoun, ed. Cralle, Vol. I, pp. 138-139, 284-302; Vol. VI, pp. 36-37, 50-51, 68-69, 111-112, 142-143, 172-180, 224-226.

"Government", he says, "is the representative of a State and the organ through which it acts. As such it is vested with all

powers necessary to the performance of its high functions and which are not prohibited or expressly withheld by its Constitution, and among them, the most important of all, that of self-preservation. In our complex political system, the powers belonging to Government, as has been stated, are divided,—a portion being delegated to the Federal Government, as the common representative of all the States in their united character;—and the residue expressly reserved, to be exercised by the States in their separate and individual character. Of this portion, the State Governments are the representatives and organs; and as such, are invested with all the powers not delegated, which properly appertain to Government, and which are not prohibited by their own, or the Federal Constitution. But they do not comprehend the power to make, alter or abolish constitutions, which, according to our political theory, belongs exclusively to the people; and cannot be exercised by Government unless specially delegated by the Constitution. . . . The people may alter or abolish their Constitution—but they can only do it by acting according to the prescribed forms.”

Letter to Hon. William Smith, July 3, 1843 (Works, Vol. VI, p. 224).

“By an express provision of the Constitution it may be amended *or changed* by three-fourths of the States; and thus each State by asserting to the Constitution with this provision, has modified its original right, as a sovereign, of making its individual consent necessary to *any change in its political condition*: and by becoming a member of the Union, has placed this important power in the hands of three-fourths of the States,—in whom the highest power known to the Constitution actually resides.” (Italics ours.)

South Carolina Exposition (Works, Vol. VI, p. 37).

As a result of his view of the Constitution as a compact between sovereign states, he derives his doctrines of “State Interposition” or “Nullification”, under which he vests any State with the right to nullify an unwarranted assumption of power by the Federal Government, because of the right, inherent in each State by virtue of its original sovereignty and unsundered by each, of self-government. This right, however, if not counterpoised, he recognizes might tend too strongly to weaken

the General Government and derange the entire system; and the counterpoise he places in the strengthening of the amending, or as he prefers to call it, the repairing power, by placing this power in the hands of three fourths of the States, whose act then is binding upon all, rather than leaving it necessary to obtain unanimous consent to any change as was the case under the Articles of Confederation. His conclusion is that although a State might exercise this power of nullification against unwarranted assumptions of power by the General Government, nevertheless it is equally true that, no matter how unwarranted such an assumption may be under the Constitution, if the contested power, by an amendment to the Constitution, is granted to the General Government by three-fourths of the States, the controversy is then terminated against the State which has contested it. This theory is set forth very clearly and at considerable length in his work "On the Constitution and Government of the United States"; in the "South Carolina Exposition"; in his "Address on the Relation of the States and Federal Government"; in his "Report on Federal Relations"; in the "Address to the People of South Carolina"; in a Letter to Governor Hamilton of South Carolina, August 28, 1832; and in a letter to the Hon. William Smith on the Rhode Island Controversy, July 3, 1843.

Works of Calhoun, ed Crallé, Vol. I, pp. 138-139, 284-392; Vol. VI, pp. 36-37, 50-51, 68-69, 111-112, 142-143, 172-180, 221-226.

Out of the mouth of the greatest exponent of that theory of the American system of government upon which rests any implied restriction upon the amending power that would prevent it from extending to fundamental changes in the existing form of government, such restrictions are denied and the doctrine condemned.

And this must necessarily follow from the nature of the amending power as an essential attribute of sovereignty, inherent in the ultimate authority of the State. Whether that sovereignty be vested in the people of the United States collectively, or in the peoples of the several States, or in the States themselves as the supreme source of power, is immaterial. That sovereign power, wherever it be located, carries

with it the right to amend the instrument by which it has distributed governmental power, unhampered by all except those restrictions which it has itself imposed. The method in which the change shall be made may properly be laid down in its formal constitution, and must be followed. But the right to make the change is not and cannot be surrendered, and is beyond legal limitation; the prescribed method having been followed, any and all changes are and must be valid.

In a recent case this Court has said:—

"The people of the United States, by whom the Constitution was ordained and established have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all."

Dillon vs. Gloss, 256 U. S. — (decided May 16, 1921.)

3.—THE NINETEENTH AMENDMENT IS WITHIN THE MEANING OF THE WORD "AMENDMENTS" AS USED IN ARTICLE V.

The argument was further made by those attacking the validity of the Nineteenth Amendment that the right of the sovereign power to alter its constitution of government in any manner may be granted; but that the method of making such alteration is not laid down in Article V—that the word "amendments" therein is properly to be restricted in its meaning to changes closely related to the subject matter of the whole instrument—that any change which can be made in the manner prescribed by the Article must be of a kind "germane" to the other parts of the Constitution. Any alterations working a fundamental change in the distribution of governmental powers, it was contended, are not germane, cannot be adopted under Article V, but must be made and ratified in the same manner and by the same agencies as the original constitution, to wit, by a convention whose acts are ratified by *every* State.

It is difficult to see, even admitting the validity of the argument, in what way the Nineteenth Amendment is thereby

barred from proposal and ratification under the provisions of Article V, as an amendment contrary to the purposes of the original Constitution. Those purposes are set forth in the Preamble as follows:

"We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Does the Nineteenth Amendment run counter to these purposes? Does it not rather operate to give them voice and effect? "To form a more perfect union;" one of the main objections raised against the Amendment is that it lays open a way to weld the component parts of this nation too closely into one whole. By a "more perfect" union, the framers meant nothing if they did not mean a "closer" union; under the Articles of Confederation, the union was found to be too loose, too cumbersome, too much hampered by the individual powers of each separate State, and the result was the Constitution. Union does not mean that the parts must forever be kept separate and distinct, but on the contrary that they are to be brought together and merged into one another.

"To establish justice;"—and is not that the very aim and purpose of the Amendment? To give citizens of their country, subject to its laws, a right to have a voice in the making of those laws and the choosing of their representatives in the law-making bodies, after long years of being classed with criminals, infants, and lunatics—is not this an establishment of justice which is in direct keeping with the true principles of democratic and republican forms of government?

"To promote the general welfare";—the proponents of equal suffrage have vigorously contended, for more than half a century, that the general welfare will be promoted by its adoption; its opponents have just as strenuously denied it. The enactment of the Nineteenth Amendment is an utterance by the sovereign people of this country that the general welfare is so promoted; and their verdict is not open to dispute.

"To secure the blessings of liberty to ourselves and our pos-

terity";—no greater blessing of liberty can exist than the right to a voice in the functioning of governmental power. Without it, there can be no liberty for one who is compelled to accept silently any and all commands of a government in which he has no voice. The women of the United States constitute a portion of its people; and if the Nineteenth Amendment, by vesting in them the right to make their voice heard in their government, has endowed them and their posterity with that greatest blessing of liberty, it is in keeping with the express purposes of the Constitution and germane to it.

That the word "amendments" in the Constitution means alterations, of whatever kind and character, in that instrument was, however, unquestionably the intention of its framers.

The Federalist, No. 43.

The point was decided, by implication at least in the Prohibition Amendment cases. The same argument was raised at that time and vigorously pressed; certainly, if it could be regarded as valid, it would attach with much greater readiness to the Eighteenth Amendment than to the Nineteenth, for the former not only took away from the several States their police power over certain subjects, but in addition was in no wise related to any former provisions of the Constitution. As its opponents argued, it *added* a new provision instead of *amending* one already existing. Yet it was held a valid exercise of the amending power.

Rhode Island vs. Palmer, 253 U. S. 350.

The whole argument that an amendment, to come under the provisions of Article V, must be related to some one or more specific parts of the Constitution is well answered in a recent case by the District Court for the Southern District of Ohio, through Hollister, J., in the following words:

"It is urged, as I understand it, that an amendment must be germane to that which it amends, and that there is no clause in the Constitution to which the proposed amendment (The Eighteenth) is in any way related. Assuming, however, that it is not, yet one is not willing to go so far as to say that the people have limited their right to surrender their power over any subject theretofore reserved, because unrelated to any power theretofore surrendered. The amendment goes to the Constitution

as a whole, not necessarily to any particular clause in it. The Constitution is the organic and fundamental law, but that law may be changed, added to, or repealed, if that is done by the States and the people themselves in the way provided. Their power to better it, as they think, is not to be hamstrung by mere rigidity of definition of words. Adding something new to the organic law is an amendment to the organic law in the judgment of this Court."

State of Ohio, ex rel. Erkenbrecher vs. Cox, 257 Fed. 334, 342.

The sovereign power of the nation established the Constitution and the one basic, underlying purpose of that instrument was to make a distribution of governmental powers between two sets of agencies—the National and the State Governments. An amendment which operates to change that distribution is germane as nothing else can be,—is an amendment in the strictest sense of the word—for it goes to the root of the whole instrument and amends it in order to make it conform to a change in the idea of the sovereign people as to the manner in which governmental power shall be distributed.

4. THE ANALOGY BETWEEN AMENDING AND TAXING POWER IS NOT WELL FOUNDED.

The analogy attempted to be drawn between the limitations existing upon the taxing power granted to Congress by Article I, Sec. 8, Par. 1, by implication from the dual system of government established by the Constitution, exemplified by the case of *Collector vs. Day*, 11 Wall. 111; and the similar limitations sought to be placed upon the amending power, is an analogy only and an ill-founded one. That case, and others like it, hold, it is true, that, although a general grant of power was made to Congress to lay and collect "taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States" without express limitation beyond one of uniformity, yet such power was impliedly limited by the distribution of all governmental powers under the Constitution; and since the power to tax was the power to destroy, an attempt by Congress to levy a tax upon governmental instrumentalities of the several States was unconstitutional. Those holdings were manifestly correct and in no manner opposed to the view that the amending

power is substantially unlimited and entirely so as far as concerns any implied restrictions from the nature of the form of government established by the Constitution.

Congress, in seeking to exercise such a power as the taxing power, was a *governmental* agency exercising a *governmental* power. It could not validly go beyond the limits of the powers granted to it by the Constitution which established it. It was bound by the Constitution as it then stood, and by the distribution of governmental powers there laid down. To regard it as capable of deranging the entire system was to regard it as capable, in effect, of *amending* the Constitution of exercising, as a *governmental* agency, a power inherent in *sovereignty* and not granted to it. As an instrument of *government*, it could not assume the exercise of *sovereign* rights uncontrolled by the distribution of governmental powers under the Constitution, without itself becoming the sovereign, unless such rights were granted it by the ultimate authority within the body politic. The right to amend the Constitution by a simple legislative act was not so granted. But that is a different thing from saying, as is said here, that under the amending power Congress cannot validly by a two-thirds vote, propose for ratification by the legislatures of three-fourths of the States an amendment which would have the effect of utterly transforming the present scheme of distribution of governmental authority. Such cases as those cited do not hold that an amendment to the Constitution by which Congress was expressly authorized to tax State governmental instrumentalities would be improper; they hold simply that under the Constitution, as it stood, *unamended*, no such power to tax could be assumed.

5.—THE ARGUMENT FROM CONSEQUENCES OF NO VALIDITY.

In construing the operation and effect of the Fourteenth Amendment, Justice Miller used the following language:

"Was it the purpose of the Fourteenth Amendment—to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government. * * * All this and more must follow, if the proposition of the Plaintiffs in error be sound. * * * The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument.

But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt.*" (Italics ours.)

The Slaughter House Cases, 16 Wall. 36, 77-78.

And accordingly the Fourteenth Amendment—and undoubtedly the same will hold true for the Nineteenth—was given an interpretation which did not endow the Federal Government with additional powers so great as fundamentally to alter the nature of the existing form of government. It is noteworthy—particularly in view of the fact that the invalidity of the Nineteenth Amendment is sought to be established from the possibility of its effecting such a fundamental change rather than from any fear that it will probably do so—that the Fourteenth Amendment, although recognized as possessing a similar possibility, was not held invalid. But aside from that, and assuming, *argumentum ad argumentandum*, that the necessary and direct effect of the Nineteenth Amendment is to work such a fundamental change, can, then, its invalidity be argued from the words of Justice Miller? We respectfully submit that the very reverse is the fact; and that those words say, in effect, that the Court will never construe any amendment as causing a radical change in our theory of the relations of the State and Federal Governments as long as there is room for doubt that such a change was intended and a contrary interpretation may possibly be placed upon them. But, if the language of the amendment expresses that purpose too clearly to admit of doubt, then the force of the argument from consequences loses its irresistible force and the amendment, together with the radical change embraced by it, will stand as part of the Constitution.

6.—SUMMARY.

We respectfully submit that agreeably to Article V, the

people of the United States may, acting in their sovereign capacity, through the agency of two-thirds of both houses of Congress and the legislatures of three-fourths of the several States, amend their Constitution of government in any way they think proper, subject only to the express limitations set forth in that Article; that they are totally unrestricted by any implied limitations arising out of the fundamental nature of the government; and that this follows necessarily from the nature of the amending power itself as a manifestation of the sovereign will of the ultimate source of authority within the body politic.

B.—THE QUESTION OF THE EXPRESS LIMITATIONS UPON THE AMENDING POWER.

1. THE QUESTION OF EQUAL SUFFRAGE IN THE SENATE.

It is contended in this case that the Nineteenth Amendment falls within the express limitation in article V, that no State shall be deprived of its equal suffrage in the Senate without its consent. This argument proceeds upon the theory that by successive amendments of a similar character the States might be deprived of all legislative power and all power to determine their own governmental structure, so that as a result the States which are guaranteed equal suffrage in the Senate would go out of existence; that this proviso in Article V necessarily implies the continued existence of the States as bodies capable of consenting—that is, as autonomous, self-governing sovereignties; that where the electorate of a State is changed through an outside medium, the State itself is changed, and has ceased to exist as the State whose continued existence is alleged to be required by the limitation in question.

This is in part the argument from the standpoint of abuse—from the consequences that might follow. As Justice Miller points out in the *Slaughter-House Cases*, cited before, such an argument is not always the most conclusive. It is indeed a very dangerous class of argument. For it is worth while pointing out that any governmental power, if carried to its extreme, is capable of leading to absurd and disastrous results; and this argument against the existence of the amending power, in the sphere which we claim for it, is equally an argument against vesting power anywhere.

It is elementary that the words of the Constitution are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged; that those who framed and adopted it are presumed to have meant what they said; that debates and proceedings in the Constitutional Convention are not admissible to control the construction of the plain language of the instrument.

Martin vs. Hunter's Lessee, 1 Wheat. 304.

Gibbons vs. Ogden, 9 Wheat. 1.

Legal Tender Cases, 12 Wall. 457.

The meaning of the words used in this proviso to Article V is plain upon the face thereof. It is simply that no amendment can give a State a smaller vote in the Senate than that possessed by other States, without the consent of that State; and that no amendment can give a State a greater vote in the Senate than that possessed by other States, without the consent of all the other States.

Such an interpretation is not only that which plainly appears from the language used, but it is also the one which the history of the adoption of the proviso shows to be correct. It is a matter of historical knowledge that at the time of the framing of the Constitution, there was conflict between the delegates from the small States and those from the larger ones as to the basis upon which representation in the National Legislature should be founded; that the former desired a representation according to the States, while the latter thought it should be according to population. The result was the famous compromise by which the representation in the lower house was based on population and that in the upper according to States. It was in order to secure the principle by which each State should have the same voice in the Senate, that the proviso was adopted, and was, says Madison (*The Federalist*, No. 43) "probably insisted on by the States particularly attached to that equality." It is plain that it is *equality* of representation that is emphasized and that it is desired to protect; and the proviso is necessarily to be construed in connection with the struggle of the smaller States for such equality of representation in the upper branch of the legislature.

*Farrand, Records of the Federal Convention, Vol.
2, pp. 629-631.
The Federalist, No. 43.*

It needs no argument to show that the Nineteenth Amendment operates equally upon all the States, renders them all subject to the same limitation,—a prohibition against discrimination on account of sex in extending the vote to citizens of the United States. Their equal voice in the Senate is not interfered with in any respect. How, then, can it be said that the effect of the Nineteenth Amendment is to deprive any State of its equal suffrage so reserved to it?

2. THE QUESTION OF THE ALLEGED EXPRESS RESTRICTIONS
UPON THE AMENDING POWER EXISTING IN OTHER PARTS
OF THE CONSTITUTION.

It was further contended by those attacking the validity of the Nineteenth Amendment that the amending power is expressly limited by restrictions to be found in other provisions of the Constitution. The argument is closely allied to that which would establish implied restrictions from the nature of the Constitution, but has validity to the extent that where the spirit of that instrument may be collected from its express words, it will be given effect, although that spirit cannot be invoked as an invalidating influence except under such conditions and the clear language will always prevail.

Sturgis vs. Crowninshield, 4 Wheat. 122.

Dartmouth College vs. Woodward, 4 Wheat. 518.

Jacobson vs. Massachusetts, 197 U. S., 11.

(a)—*No Restrictions Contained in Guarantee of Republican
Form of Government.*

It was contended first that such an express limitation is to be found in Article IV, Section 4, which provides that the United States shall guarantee to every State a republican form of government.

The question of whether this guaranty of the Constitution has been disregarded is not one which this Court is at liberty to consider or decide. It has been repeatedly decided that such a question is political and not judicial. It presents no

justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."

Davis vs. Hildebrand, 241 U. S., 565, 569.

Pacific States Telephone & Telegraph Co. vs. Oregon, 223 U. S., 118.

Kiernan vs. Portland, 223 U. S., 151.

Mountain Timber Co. vs. Washington, 243 U. S., 219.

Luther vs. Borden, 7 How. 1.

But even if such a question were open for determination by the Courts, it is difficult to see in what way it is violated by the Nineteenth Amendment. By a republican form of government is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy in which the people as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man or with that of one class of men.

Cooley, Principles of Constitutional Law, Chap. XI.

Luther vs. Borden, 7 How. 1, and the argument of Daniel Webster therein.

How can it be said that government through representatives chosen by the people is in any manner interfered with by an amendment that does nothing except prohibit discrimination in the exercise of the power of voting for their representatives against a certain portion of the people?

(b)—*No Restriction Contained in Ninth and Tenth Amendments.*

It is secondly contended that there is an express restriction upon the amending power to be found in the Ninth and Tenth Amendments which provide as follows:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"The Ninth Amendment," says Justice Story, "was manifestly introduced to prevent any perverse or injurious mis-

application of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strongly forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights."

Story on the Constitution, (5th ed.) Vol. 2, Sec. 1905.

So far from implying a restriction on the amending power, its effect is distinctly the opposite. Among the rights retained by the people is the weightiest of all, the one which embraces all others,—the right to change the Constitution and to distribute governmental powers among governmental agencies. It was against just such a perverse misapplication of the maxim quoted by Justice Story as is here presented,—to wit, that, because only certain powers have heretofore been granted to the Federal Government, no others can henceforth be granted—that the Amendment operates. The Constitution vests certain governmental rights in the several States; the fact is not to be construed to deny or disparage the great right retained by the sovereign people to change their form of government in the way they have laid down. To assert the contrary is a political heresy of the first order.

The Tenth Amendment, says the same eminent authority, "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows, irresistibly, that what is not conferred is withheld, and belongs to the State authorities if invested by their constitutions of government respectively in them; and if not so invested, it is retained by THE PEOPLE, as a part of their residuary sovereignty. . . . It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgment of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. . . .

The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word 'expressly' to qualify what is general and obscure what is clear and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter, and employ criticism to support a theory, and not to guide it." (Italics ours.)

Story on the Constitution, (5th ed.) Vol. 2, Sec. 1907.

That the Tenth Amendment is not to be interpreted as placing a restriction upon the power to amend, is strikingly shown by the words of Justice Brewer, rendering the opinion of the Court, in *Kansas vs. Colorado*, 206 U. S., 46.

"This Amendment . . . disclosed the widespread fear that the National Government might, under the pressure of a supported general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should even find justification in the organic act, and that if in the future, further powers seemed necessary, they should be granted by the people in the manner provided for amending that act. Its principle purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. . . . The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all the powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. *The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provisions for an amendment to the Constitution by which any needed additional powers could be granted, they reserved to themselves all powers not so delegated. This Article Ten is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.*" (Italics ours.)

Kansas vs. Colorado, 206 U. S., 46, 90.

The first ten amendments constitute a Bill of Rights, and it is out of the general powers of *government* that everything enumerated in the Bill of Rights is excepted, not out of powers which are not powers of *government* at all, like that of amending the Constitution. "A power of government is a power which expends itself in administering or operating the political machine established by the Constitution, not one which goes to the rebuilding of that machine itself; or to use a metaphor * * * it is a power proper not for the mill-wright, but for the miller."

Jameson, Constitutional Conventions, Sec. 555, p. 586.

In *State of Ohio ex rel. Eckenbrecker vs. Cox*, 257 Fed., 334, it was urged upon the Court that the Tenth Amendment works a restriction upon the amending power; and the Court answered (p. 342):

"Counsel do not favor the Court with decisions on this subject, but granting to the claim all that may be argued for it, it must be said that the members of the Senate and the members of the House are the representatives of the States and the representatives of the people, respectively, to whom is given the power to propose amendments to the Constitution which become such only when the representatives of the people in three-fourths of the States concur. Reserved powers are so called, because they have never been surrendered. When the requisite number of States concur, the people surrender to the United States additional power. It may be absolute, or it may be concurrent, becoming absolute only when Congress shows an intention of occupying the whole field embraced by the particular subject."

The Constitution in Article V lays down the manner in which it shall be amended. Neither the Ninth nor the Tenth Amendment changes that manner one iota. Article V stands in precisely the same form as that in which it was originally adopted, carries the same powers, is endowed with the same meaning. At any time the sovereign people could by amendment have changed it and provided a different method. As is pertinently said by the Court of first instance in this case (Record, p. 21), "the founders of the Government and their advisers * * * knew that Article and what it meant * * * and they let it stand unchanged, reserving in the provisos all they desired to reserve." The Ninth and Tenth Amendments

are rules of interpretation, nothing more; and they neither add to nor detract from the rights and powers granted under the original instrument.

C.—THE QUESTION OF THE FIFTEENTH AMENDMENT.

The plaintiffs in error in this case made no attempt in the Maryland Courts to differentiate in kind between the Nineteenth Amendment and the Fifteenth; now, however, such a distinction is attempted to be made. It is difficult to perceive any basis for it. Neither Amendment directly confers a grant of suffrage upon any class of citizens. Both operate solely to prevent discrimination in the exercise of suffrage on account of certain named things. When it is said that the Nineteenth Amendment directly confers the right of suffrage upon women, we submit simply that this is erroneous except in so far as the same observation held good for the Fifteenth Amendment.

It is true to a limited extent, and to the same extent it was true of the Fifteenth Amendment. Speaking of the latter Article, this Court has said:

"While it is quite true . . . that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave holding States had not removed from their Constitutions the word 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the state law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women.

"In such cases this 15th Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

Ex parte Yarborough, 110 U. S. 651, 665.

When it is said that there is a distinction because in the one

amendment discrimination on account of race is provided against while in the other the prohibition is against discrimination on account of sex, we say that this is a distinction without a difference. For the principle in each case is the same—viz., a prohibition against a discrimination by the States which otherwise they were at full liberty to make.

That there is no distinction in kind between the Nineteenth and the Fifteenth Amendments we think so clear and apparent that argument on the point is unnecessary. The Court of Appeals of Maryland said very properly:

"If . . . the Fifteenth Amendment was a valid exercise of the amending power, it is impossible to conceive that the Nineteenth Amendment was not likewise a valid exercise of that power, because it is not possible to distinguish the two in principle." (Record, page 153.)

If then the Nineteenth Amendment is invalid either because of restrictions necessarily implied upon the amending power or because it deprives the State of Maryland of its equal suffrage in the Senate without its consent in violation of the provisions of Article V itself, it is necessarily true that the Fifteenth Amendment as well, either was subject to such implied restrictions or was an amendment operating to deprive the several States of their equal suffrage in the Senate.

If validity is to be attached to the theory of the existence of implied restrictions upon the amending power; and if the Nineteenth and Fifteenth Amendments are of a class prohibited for this reason; *then neither of those Amendments were of a kind which Congress had power to propose, or which the State Legislatures had power to ratify.* For if the theory of implied restrictions means anything, it means that as to Amendments of a character such as the Nineteenth, there is an immovable bar, implied from the nature of our form of government, absolutely preventing any validity from ever attaching to them. In other words, such amendments would be unconstitutional Amendments.

It has been said:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Field, J., in *Norton vs. Shelby County*, 118 U. S. 425, 442.

No more could an unconstitutional amendment confer rights, impose duties, afford protection or create offices. In legal contemplation, such an amendment, too, would be as inoperative as though it had never been adopted. If there are implied restrictions upon the amending power, which attach to the Nineteenth Amendment, that Amendment, to be sure, is an absolute nullity. But it holds equally true that the Fifteenth Amendment is likewise so. No lapse of time, no consent presumed from long acquiescence, no absence from direct attack for many years, no consent under the duress of war conditions, could operate to vest it with validity. Now, equally as when first adopted, it is null and void; and this Court would have been constrained so to hold in *Myers vs. Anderson*, 238 U. S. 368, when for the first time a direct attack was made upon it.

The fact of the existence of the Fifteenth Amendment as an unquestionably valid part of the Constitution, is, we submit, the most effective of all arguments against the theory that there are implied restrictions upon the amending power which can be of any avail in the present case.

Upon the other hand, it is quite true, as stated in the brief for the plaintiffs-in-error, that, if the Fifteenth Amendment (and likewise the Nineteenth) be regarded as an amendment of a kind contemplated by the proviso in Article V—that is to say an amendment depriving the several States of their equal suffrage in the Senate—then it could have attained its present validity and properly become a part of the Constitution, binding upon all the States, by virtue of each and every State consenting thereto.

In this connection we submit that the following conclusions result. If the Fifteenth Amendment has received the consent of each State, as contemplated by Article V, then its present validity is at least of great persuasive force in determining the validity of the Nineteenth Amendment; and is conclusive upon the validity of the Nineteenth Amendment if neither is of a character such as to deprive the several States of their equal suffrage in the Senate. On the other hand, if the Fifteenth

Amendment became a valid part of the Constitution immediately upon its ratification by the legislatures in three-fourths of the States, its present validity is conclusive upon the validity of the Nineteenth Amendment, inasmuch as it necessarily follows therefrom that neither Amendment is of a character embraced by the proviso to Article V in question. Furthermore, if no consent, as contemplated by Article V has ever been given to the Fifteenth Amendment by even one State, it must be concluded that that Amendment (and likewise the Nineteenth) was not one depriving the several States of their equal suffrage in the Senate, since it is unquestionably valid as to every State at the present time; and that such validity on its part resulted from ratification by the legislatures in three-fourths of the States, and not from the fact of each and every State consenting thereto.

We do not propose to make further argument upon the point that neither of these two amendments are of a character such as to deprive the several States of their equal suffrage in the Senate. What we have previously submitted in that connection as to the Nineteenth Amendment applies as well to the Fifteenth. We say only that the proviso in Article V is to be construed according to the plain meaning of its words; that under such a construction it means simply that each State shall be equally represented in the Senate; and that an amendment which operates uniformly upon all the States cannot be regarded as depriving any one of them of its equal suffrage in the Senate.

What, however, was the actual situation with respect to the adoption of the Fifteenth Amendment? And in what way can the consent of a State be given to an amendment which deprives it of its equal suffrage in the Senate?

When the Fifteenth Amendment was proclaimed as part of the Constitution by the Secretary of State of the United States on March 30, 1870, it had been ratified by only twenty-nine out of thirty-seven States. That it did not receive universal consent is a matter of history. In Maryland, the consent of the State was expressly refused and by a joint resolution of the Maryland Senate and House of Delegates it was resolved "That the Legislature of this State hereby reject the said Fifteenth Article proposed as an amendment to the Constitution of the

United States, and on behalf of the State of Maryland, refuses to ratify the same."

Acts of 1870, page 931, Joint Res. No. 8.

No express ratification of that amendment has in fact ever been had by the Maryland legislature. Unless Maryland has given its consent, it follows either that the Amendment is even now of no force in Maryland, which is naturally eliminated; or that the amendment did not deprive Maryland of her equal suffrage in the Senate.

We submit that consent by a State to an amendment to the Federal Constitution depriving that State of its equal suffrage in the Senate can only be given in the same way that it is given to other amendments under Article V. Only two methods of ratifying Amendments are provided in the Article; it follows that only those two methods are to be used for all amendments covered by the Article. It has been recently held, in fact, as to the Nineteenth Amendment, that it could not be ratified by a referendum vote of the people of a State, but only by the legislature of the State or by a convention called for the purpose as one or the other mode of ratification may be proposed by Congress.

Hawke vs. Smith, 253 U. S. 231.

Grant that for which plaintiffs-in-error contend, viz., that the Nineteenth Amendment is one depriving the several States of their equal suffrage in the Senate; and we have here a decision that such an amendment can only be assented to in any State in one of the two ways provided in Article V. And if this be true, then in Maryland and other non-ratifying States, the Fifteenth Amendment has not been consented to and is not valid, for it likewise deprived those States of their equal suffrage in the Senate.

Such a conclusion is, of course, not to be considered, and the only alternative is that the Fifteenth Amendment did not deprive those States of their equal suffrage, this necessarily being true as to the Nineteenth Amendment as well; in consequence of which the Fifteenth (and likewise the Nineteenth) became a valid part of the Constitution upon its ratification by the legislatures in three-fourths of the States.

Plaintiffs-in-error contend, nevertheless, that consent may be given (and in the case of the Fifteenth Amendment had been given) by a State to an amendment depriving it of its equal suffrage in the Senate through general acquiescence on its part, irrespective of the fact that no formal ratification has been made by it. The element of uncertainty and confusion which such a theory would introduce is apparent and should be sufficient to condemn it. How long must such acquiescence continue? How is it to be manifested? How is one to know when the State has given its consent? When does the Senate become estopped from denying the force of an amendment to which it has not expressly consented?

It is surely significant that this Court in 1876 in *United States vs. Reese*, 92 U. S. 214, regarded the Fifteenth Amendment as in force, not in those States only which had ratified it, but everywhere, saying (page 217):

"It prevents the States, or the United States, from giving preference, in this particular to one citizen of the United States over another, on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment there was no constitutional guaranty against this discrimination; now there is."

It is surely significant that, only eleven years after the adoption of the Fifteenth Amendment, this Court said of its effect upon the Constitution of Delaware—a state which had not ratified the amendment and taken no active steps to signify its consent thereto—and which Constitution still contained a provision limiting the right of suffrage to free white male citizens (as does the Constitution of Maryland to this day):

"Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, that provision which restricts the right of suffrage to the white race."

Neal vs. Delaware, 103 U. S. 370, 389.

In the period of eleven years, in the period of six years even, the Fifteenth Amendment had become operative in States which had never expressly assented to it. If, as plaintiffs-in-error contend, it became operative, not through ratification by three-fourths of the State Legislature, but through an implied acceptance in all the States, such acceptance was presumed in a very short period of time; indeed not so much from lapse of time, but from any acts consistent with assent on the part of the State, such as the holding of elections in which negro voters were not only permitted to participate, but protected by State laws in doing so.

If this be sufficient consent on the part of the State, then Maryland has given its consent to the Nineteenth Amendment; for not only have elections been held in which women have participated, but the laws of the State have been amended in order to make provision for such participation.

At a special session called by the Governor of Maryland in 1920 the following act was passed, effective September 22, 1920:

"An act to afford adequate facilities for the women of Maryland to exercise the right of suffrage granted by the Nineteenth Amendment to the Constitution of the United States by

"A. Adding two new sections to be known as Sections 23-A and 34-A to Article 33 of the Annotated Code of Maryland, title 'Elections,' the same providing for two additional registration days in Baltimore City and in the Counties in the year 1920.

"B. Adding a new section to be known as Section 127-A to said Article 33, the same directing Boards of Supervisors of Elections in the Counties and authorizing the Board of Supervisors in Baltimore City to establish an additional polling place in precincts or election districts in which more than 800 persons are registered.

"C. Amending Section 31 of said Article 33, so as to provide that the Board of Registry in the Counties shall hold a session from nine o'clock A. M. to nine o'clock P. M.

"D. Amending Section 63 and repealing Section 63-A and 63-B of said Article 33, so as to provide that the polling places throughout the State shall open at six A. M. and shall close at seven P. M.

"E. Amending Section 17 of said Article 33, so as

to provide for cases of women claiming citizenship by marriage, and for the recording of the sex of applicants for registration.

"F. Amending Section 6 of said Article 33, so as to increase the clerical force of the Supervisors of Elections, of Baltimore City, and providing compensation therefor.

"G. Adding a new section to said Article 33 to be known as Section 118A, so as to increase the compensation of judges and clerks of elections and registration officials.

"H. Providing for the payment of expenses incurred under the provisions of this Act.

"I. Extending the application of said Article 33 so as to include the feminine gender."

By Section 7 of the Act, Article 33, Section 17 of the Maryland Code dealing with the proceedings of Boards of Registry, was amended as follows:

"In the case of a woman who claims citizenship by marriage, the Board shall note the same of the person to whom married and where and in what court he was naturalized, or where previously registered. Under the column headed 'Remarks' they shall note whether applicant is male or female."

By Section 11 of that Act, a new section was added to Article 33 of the Maryland Code title "Elections," known as Section 1-A and reading:

"Whenever in this Article words or phrases are used denoting the masculine gender, they shall be taken to include the feminine gender."

We submit that Maryland has consented to the Nineteenth Amendment as fully as ever she assented to the Fifteenth.

Plaintiffs-in-error also argue that the conditions under which reconstruction was accomplished after the Civil War removed the question of consent from the realm of judicial decision; and say that "the consent yielded by the seceding States to the so-called War Amendments was as conclusive upon this Court, as the inevitable result of a great war, as if it had been spontaneously granted by free legislatures in times of peace." Apparently this is to hold true as well of non-seceding States, such as Maryland and Delaware, which did not ratify; and

in spite of the fact that Maryland expressly refused to assent to the Amendment. Such a statement, if true, would, of course, mean that the Fifteenth Amendment was never in need of ratification by any of the States, but that their consent was implied, as the inevitable result of the Civil War. We are unable to perceive how the Fifteenth Amendment could have ever attained validity in such a manner.

It is true indeed that in the Slaughter-house Cases, Justice Miller points out that the underlying purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizens from the oppressions of those who had formerly exercised unlimited jurisdiction over him." They were adopted to secure one of the purposes for which the Civil War was fought—to wit, the abolishing of slavery. They were, nevertheless, amendments to the Constitution and could have no validity except as viewed in that light. That even after the Civil War, Congress had no power, except under power conferred by an amendment to the Constitution, to abolish slavery or enfranchise the negro, is necessarily implied from the language of the Superior Court in *White vs. Hart*, 13 Wall., 464. In that case, in construing the provision of the Constitution of Georgia of 1868, which provided that no court or officer should have jurisdiction to try, or give judgment on or enforce any debt the consideration of which was a slave or the hire thereof, and holding the same to be regarded as the voluntary act of the State, the Court took special occasion to say:

"If Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the national Constitution."

White vs. Hart, 13 Wall., 646, 649.

If Congress had no power under the Constitution to dictate such a proviso, it had no power to enfranchise the slave, which was fully as much an incursion into the rights of the States. It was not until expressly granted the power by a duly proposed and ratified amendment to the Constitution that it could so act. The Fifteenth Amendment, as Justice Miller points out in another part of his opinion, had the effect of imposing addi-

tioned limitations upon the State governments and conferring additional power upon the national government; it partially redistributed the powers of government laid down by the original Constitution and was necessarily therefore an amendment of that instrument.

Furthermore, in order to have any validity, it must have been an amendment proposed and ratified in the authorized way and not by a fiat of Congress. Those who raise the contrary argument are placed in the strange position of at one and the same time denying that even the sovereign people, through their duly appointed agents, cannot amend their form of government so as to work a fundamental redistribution of power therein; and yet asserting that a governmental agency can, in an entirely unauthorized manner, validly do that very thing forbidden to the sovereign. The Fifteenth Amendment was proposed by two-thirds of both Houses of Congress. It was ratified by the legislatures of three-fourths of the States. It is true that as to some of those States, the ratification by their legislatures was demanded by Congress as a condition precedent to their being granted back their representation in Congress. The authority of Congress to impose such a condition is constitutionally doubtful. But the character of those ratifications as voluntary and valid offerings is not judicially cognizable, nor can the action of Congress in accepting them as such be inquired into.

White vs. Hart, 11 Wall. 646, 649.

Willoughby on the Constitution of the United States,
Vol. I., p. 523.

The conclusion, we respectfully submit, is irresistible that the Fifteenth Amendment was a valid exercise of the amending power, properly proposed and ratified by the legislatures in three-fourths of the States, dependent for its validity upon such ratification only, and in effect from the date of its adoption; and this conclusion is only strengthened by absence from direct attack for over half a century. Only according to such a view could it ever attain validity; for, as has been elsewhere pointed out, the sovereign people possess the inherent right to amend their constitution of government in any manner and to any extent, but where they have prescribed the way in which such amendment is to be made, they must follow the method

so laid down. And the Nineteenth Amendment, if duly proposed and ratified in proper manner, is governed by the Fifteenth, and has likewise become "valid to all intents and purposes" as part of the Constitution of the United States, part of the supreme law of the land binding upon the Courts in every State, "anything in the Constitution or laws of any State to the contrary notwithstanding."

D. THE EIGHTEENTH AMENDMENT.

The validity of the Nineteenth Amendment, so far as its subject matter is concerned, is even further supported by the recent decision of this Court in *Rhode Island vs. Palucci*, 253 U. S., 330, holding the Eighteenth Amendment within the power to amend. It is indeed argued that the fact that the Supreme Court took under its consideration the validity of the Amendment constituted a statement on their part that the amending power is not unlimited and that an amendment might conceivably be beyond that power. Inasmuch as the character of amendments that may be proposed by two-thirds of both Houses of Congress and ratified by three-fourths of the Legislatures of the several States is expressly limited in Article V, so as to exclude certain classes of amendments, amendments that would affect the equal suffrage of the States in the Senate—for which another mode of adoption is prescribed—it is submitted that the holding of the Court means simply that it will assume to itself the power and duty to examine any proposed Amendment in order to ascertain whether it falls within the class which may be proposed and ratified as the Eighteenth Amendment was.

In any event, the Court held the Eighteenth Amendment to be of a kind and character fully within the amending power, saying:

"4. The prohibition of the manufacture, sale transportation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

"5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument."

Rhode Island vs. Palucci, 253 U. S., 350, 380.

The decision of the Court on this point was unanimous. Justice McKenna, in his dissenting opinion, says that the above two conclusions "seem to assert the undisputed;" and further says, (p. 401):

"The Eighteenth Amendment is part of the Constitution of the United States, therefore as of high sanction as Article VI. There seems to be a denial of this, based on Article V. That article provides that the amendments proposed by either of the ways then expressed 'shall be valid to all intents and purposes as part of this Constitution.' Some undefinable power is attributed to this in connection with Article VI, as if Article V limits in some way, or defeats an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have, and it would be nullified by the mythical power attributed to Article V, either alone or in conjunction with Article VI. A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it."

In spite of the fact that the decision of the Court states only "ultimate conclusions, without an exposition of the reasoning by which they have been reached," nevertheless those conclusions become of great and controlling significance in the present case. *For every point that is raised against the validity of the Nineteenth Amendment was raised against that of the Eighteenth.*

It was argued in *Rhode Island vs. Palmer* that an amendment under Article V must, by the meaning of the word "amendment" be a change consistent with the nature and purpose of the Constitution, to extend only to the correction of errors committed in drafting that instrument, implying an addition or change within the lines of the original instrument that would effect an improvement or better carry out the purpose for which it was framed; and that this implied restriction as to scope was embodied in the meaning which was attached to the word "amendment" by Madison and the other framers of the Constitution.

It was further argued in that case that the fundamental purpose of the framers was to establish "an indestructible union of indestructible States;" that they did not intend to

restrain the States in the regulation of their civil institutions adopted for internal government and the Constitution is to be so construed: that the power of the States to regulate their purely internal affairs by such laws as seemed wise to the local authority is inherent and has never been surrendered to the general government; that the right of a State to have whatever means or instrumentalities of local government as it deems fit and its right to enact measures of local self-government in accordance with its own peculiar wishes were wholly reserved to the States under the Tenth Amendment; that the right of the States to continue as effective local governments was implied in the Constitution and upheld as against the practically unqualified grant of the Federal taxing power in *Collector vs. Day* and other cases.

It was argued in that case that the founders of the government intended that it should ever be a true Federal system, constituting a Union of free and independent States, each possessed of distinct and substantial autonomous and self-governing power as to its own people and its own local self-government, and not a single, consolidated centralized government in which the several States were to be but forms of municipal corporations of the central government or mere geographical divisions; that the establishment and recognition in the Constitution of the two governments, Federal and State, plainly implies that neither shall be permitted to destroy the other. Many authorities were cited and it was argued at length to the effect that the right of a State to have and exercise its power of internal police was the breath of its being, without which it was nothing but a name. It was pointed out that the Eighteenth Amendment opened the way for future amendments which could deprive the State of every right of local self-government.

It was argued in that case that the express proviso of Article V, that no State without its consent shall be deprived of its equal suffrage in the Senate, necessarily implies and requires the continued existence of the States as bodies capable of consenting, which it was claimed was synonymous with their continued existence as autonomous self-governing sovereignties; that otherwise, by stripping them of their various powers they could be in effect destroyed and their equal suffrage in the Senate with them.

It was argued in that case that the Eighteenth Amendment was an act of "legislation" by the Federal government in a field prohibited to it—and it is obvious that this objection applies with far greater strength to the Eighteenth than to the Nineteenth Amendment—and as such could not find expression by way of constitutional amendment.

Against these arguments the upholders of the Eighteenth Amendment raised the points that no restrictions upon Article V could be implied from any provision of the Constitution or from the nature of the Constitution itself; that all that existed were found in Article V itself; and that under these no restraint was to be found upon the power of amendment that would prevent it from extending the power of the Federal Government to subjects formerly under the exclusive control of the States. They are the same arguments which we urge upon this Court in the present case.

The only reason urged in support of the proposition that the arguments which proved futile against the validity of the Eighteenth Amendment, should yet prevail against that of the Nineteenth, is that the latter directly affects the fundamental governmental functions of the several States while the former does not. We submit that the reason is not founded upon fact, and that it cannot be properly said that the Eighteenth Amendment does not, partially at least, take away or diminish from the State any such power or function. No more fundamental governmental function can be conceived than that of raising revenue for the carrying on of the governmental organization. Prior to the Eighteenth Amendment this could be done—and was done—in part through a system of liquor licensing; now that means is at least seriously curtailed in every State of the Union.

However that may be, the unquestionable result of the decision in *Rhode Island vs. Palmer* was to hold it proper, by constitutional amendment, to work a redistribution of governmental power under the Constitution, to vest in the Federal Government the right to interfere in matters heretofore exclusively left to the several States irrespective of their policies and laws, and to establish a precedent for the adoption of other amendments in future that might conceivably take all power of self-regulation and government from the several States.

E. SUMMARY.

We respectively submit that the Nineteenth Amendment was a valid exercise of the amending power under the Constitution and is to be respected as such. The framers of the Constitution, in prescribing the method to be used in amending that instrument, endeavored to establish a way in which it could be altered to meet changed conditions and circumstances while at the same time to guard against instability from light or frequent innovations. They sought to make changes practicable, but not too easy; to guard "equally against that extreme facility which would render the Constitution too mutable and that extreme difficulty which might perpetuate its discovered faults."

Story on the Constitution (5th ed.), Vol. 2, Sec. 1827.

The Federalist, No. 43.

They thought that the two methods which they prescribed—to neither of which incidentally does any authority ascribe a superiority over the other—were calculated to accomplish that purpose. For more than a century all commentators have held that they calculated well; that if they erred at all, it was on the side of too great difficulty of amendment. Only very recently has the criticism been raised that the danger lies in the facility of the exercise of the amending power. Assuming the truth of such criticism, and the way for correction lies open. But it is not by judicial limitation of a power inherent in sovereignty; it lies, and lies only, in a change in the method of adopting amendments, which can be made by the sovereign people in the manner they have prescribed, and by the sovereign people alone.

III.—THE FORMAL AND ACTUAL RATIFICATION OF THE NINETEENTH AMENDMENT.

The second contention of the Appellants in this case is that the Amendment, even if a proper one, has never in fact been properly and formally ratified by a requisite number of State Legislatures. We answer: (1) That this Court cannot inquire into the facts which are called into question; but (2) if the Court makes such inquiry, it will find that a sufficient

number of State Legislatures have formally and properly ratified the Amendment.

A. THE BINDING EFFECT OF THE OFFICIAL CERTIFICATES OF RATIFICATION.

We submit that this Court is bound by, and cannot go behind, the resolutions of the State Legislatures ratifying the Amendment, the official notifications by the Governors of those States to the Secretary of State of the United States, and the proclamation of the Secretary of State declaring that the Amendment has become a part of the Constitution. We make this point upon the ground that such ratification and certification constitute political acts which are not subject to judicial review.

It is a fundamental principle of the American system of written constitutional law that all the powers entrusted to governments, whether State or National, are divided into the three departments of the executive, the legislative and the judicial. It is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.

Kilbourn vs. Thompson, 103 U. S., 168, 190.

It is undeniable that "the action of the political branches of the government, in a matter that belongs to them, is conclusive." *McLean, J., in Williams vs. Suffolk Ins. Co.*, 13 Pet., 415, 420, citing *Foster vs. Neilson*, 2 Pet., 243, 307.

No comprehensive enumeration of these political determinations has ever been attempted by the Courts, nor would it, by its nature, be possible. They comprehend among others, the existence and territorial extent of the sovereignty of the United States or of foreign States; the *de jure* character of their governments; questions as to the existence of war, belligerency and neutrality; whether a treaty or other international agreement is in force. We submit that they comprehend also the question as to whether an Amendment to the Constitution of the United States declared to have been ratified by a State legislature, and bearing the official attestations of the pre-

siding officers of that legislature and of the Chief Executive of the State, has, as a matter of actual fact, been so ratified.

The test as to whether any particular question is to be regarded as political is, we submit, that laid down by Justice Story in *Martin vs. Mott*, 12 Wheat. 19, 31, as follows:

"Whenever a statute gives a discretionary power to any one person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

That is to say, if a discretionary power is granted to the political branch of the government, that branch is thereby constituted the sole and exclusive judge of the necessity of its exercise and whether it has been properly exercised.

In the present case, it is a question of the ratification of a proposed amendment by the Legislatures of certain States. They were vested by Article V of the Constitution of the United States with discretion as to whether they should ratify that amendment; and they must be the sole and exclusive judges as to whether they have in fact so ratified it. It is contended that the Legislatures of West Virginia and Tennessee did not validly ratify because of non-compliance with the rules of those bodies in the proceedings. The Legislatures of those two States are empowered by the State Constitutions to formulate and adopt rules of parliamentary procedure; those rules are not laid down by the laws or constitutions of the State. Whether they have been complied with is therefore a question purely for the decision of the Legislatures themselves,—not for the Courts. Indeed it is a well established principle, resulting from the principle of the separation of powers, that the Courts will not inquire into such questions as the credentials of one claiming membership in a legislative body, or to prescribe the rules by which such bodies are governed. To hold otherwise would be an infringement by the judicial branch upon the powers of independent and equal branches of the government.

In a case previously referred to on another point, it was said, with respect to a provision of the Georgia Constitution of 1868 offered to Congress in compliance with the conditions

imposed upon the regaining by that State of its representation in the National Legislature:

"The result was submitted to Congress as a voluntary and valid offering, and was so received and recognized in the subsequent action of that body. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The acting of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it."

White vs. Hart, 13 Wall. 646, 649.

In *Georgia vs. Stanton*, 6 Wall. 50, it was said that "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all the constitutional powers and privileges" constituted political rights, the question of whose infringement was not one for the decision of the judicial branch of government, since no case of infringement, actual or threatened, of private rights or private property was presented.

We submit, therefore, that the validity of the ratification *et non* by a State Legislature of an amendment to the Constitution is a political question, constituting as it does an act of sovereignty by the agent in whom the right is vested, and affecting no private rights or property.

It was asked what remedy is available if the legislative and executive branches act in disregard of the actual facts. That point was raised in both the cases of *Martin vs. Mott*, *supra*, and *Luther vs. Borden*, 7 How. 1. In the former case, the question was with respect to the authority to decide whether the exigencies contemplated in the Constitution and the Act of 1795, ch. 101, as to calling forth the militia, had arisen; it was held that the power of decision was vested in the President exclusively, and his action could not be inquired into by the Courts. The Court says, by Story, J. (Page 32):

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest de-

votion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation of wanton authority."

In other words, should the President have called forth the militia in a time of absolute peace and quiet, contrary to the purpose of the Constitution and the Act of 1795, nevertheless *there would be no remedy against such usurpation of power on his part through the courts.*

To the same effect is *Luther vs. Borden*, 7 How., 1, 44.

It is claimed in this case that the Court may go behind the passage of the joint resolution ratifying the Amendment in Tennessee and West Virginia, and decide from the journals of the Houses in those States whether the resolutions in question were actually passed. This we deny. In *Field vs. Clark*, 143 U. S., 649, a similar contention was made that the Court could look behind an enrolled bill and determine, from the congressional records of proceedings, reports of committees and other proceedings, whether the bill as passed differed from the bill authenticated by the signatures of the presiding officers of both houses and of the President; the contention was denied, the bill as authenticated held binding upon the courts as to the form in which it was passed, and the House Journals, though required by the Constitution to be kept, held not to be open for investigation in judicial proceedings. The Court says, by Harlan, J., (page 672):

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such a bill as one that passed Congress. It is a declaration by the two houses, through their presiding officers, to the President that a bill, thus attested, has received in due form the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, has received his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the Presi-

dent of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively with the duty of enacting and executing laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

In the recent case of *State of Ohio, ex rel Erckenbrecher vs. Cox*, 257 Fed., 334, the point was raised that the Eighteenth Amendment was never in point of fact approved by the required proportion of the membership of Congress. The Court says, by Hollister, D. J., (page 345) after citing *Field vs. Clark*:

"There is ground for holding that as against such a certificate as is involved here (i. e. the certificate of passage of the Eighteenth Amendment by Congress) *the Court cannot enter into an inquiry as to the make-up of either house at the time the vote was taken* * * *." (Italics and parenthesis ours.)

In the case of *Lyons vs. Woods*, 153 U. S., 649, it was held that the courts of New Mexico could not go behind enrolled bills whose passage was duly attested, and which were duly approved, placed in the proper depository, and duly certified to and published as laws; and could not hold them void upon the ground that certain members of the quorum of one of the two bodies by which they were passed were seated without having certificates of election. In that case it was argued that certain acts had never actually passed, on the ground, as contended in the present case, that at the time of their passage a legal quorum never voted in their favor.

To the same effect is *Harwood vs. Wentworth*, 162 U. S., 547.

We very earnestly urge that the act of ratification of a proposed Amendment to the Federal Constitution is a purely political act or function—that is, an act or function committed exclusively to the political branches of government. And it has been held many times by the Supreme Court, that the action of a political branch upon a purely political question is binding and conclusive upon the judicial branch, whether such

action be right or wrong. See, e. g., *Williams vs. Suffolk Ins. Co.*, 13 Pet., 415, 420.

B.—THE REQUISITE NUMBER OF STATE LEGISLATURES HAVE, IN FACT, RATIFIED THE NINETEENTH AMENDMENT IN DUE FORM.

But even assuming that the question of the actual ratification proceedings in the several States is one which this Court may inquire into, we then contend that those proceedings were, in fact, proper and that the Amendment was duly ratified in those States. The ground of attack upon those proceedings may be placed under two heads, viz.: (1) Limitations upon the power of the Legislature to act upon the Amendment in the Constitutions of certain named States; (2) Irregularities in the adoption of the resolutions of ratification in Tennessee and West Virginia.

1.—THE RESTRICTIONS IN THE STATE CONSTITUTIONS.

The State constitutional provisions in question, with the exception of a provision by which a Tennessee legislature elected prior to the submission of a proposed constitutional amendment to the United States Constitution is forbidden from acting thereon, are claimed to forbid ratification by the States in question of an amendment such as the Nineteenth.

But we assert that under the recent decision of the Supreme Court in *Hawke vs. Smith*, 253 U. S., 221, the provisions of the State Constitutions relied upon are absolutely without effect or binding force.

The case arose in the following manner. In December, 1917, Congress proposed to the several States the Eighteenth Amendment. This was ratified by the General Assembly of Ohio, January 7, 1919; forwarded to the Secretary of State of the United States, January 27, 1919; and proclaimed adopted January 29, 1919. The Constitution of Ohio, adopted by a vote of the people in November, 1918, contained this provision:

"The legislative power of the State shall be vested in a General Assembly, consisting of a Senate and House of Representatives, but the people shall reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject

the same at the polls on a referendum vote, as hereinafter provided. *The people also reserve to themselves the legislative power or the referendum on an action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.*" (Italics ours.)

It was proposed to submit the action of the General Assembly on the Eighteenth Amendment to such a referendum, and this case was brought to enjoin the Secretary of State of Ohio from preparing the ballots and expending the public money to hold the referendum election. The Ohio Courts sustained the demurrers to the petition and dismissed it; and the case was then carried to the Supreme Court of the United States.

The Supreme Court reversed the decision of the Ohio Courts and held that the State of Ohio had no power or authority to require, by its Constitution, the submission of a proposed Federal Amendment to a referendum vote of the people of that State. The Court says, by Day, J.:

"It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

In other words, while the power of the State to enact laws and amend the State Constitution is derived from the people of the State and may be limited or restrained by provisions of the State Constitution, the power to ratify a proposed Amendment to the Federal Constitution, having been derived from the Federal Constitution itself, or more properly, from the whole people of the United States through that instrument, is to be limited only by the Federal Constitution. The power in the State Legislatures to ratify proposed Federal Amendments coming entirely from one source, it cannot be limited as to its exercise by another. The State Legislatures, in carrying out such ratifying power, act, not as the agents of their several States, but as the agents of the people at large.

See also *Dillon vs. Gloss*, 256 U. S.—(decided May 16, 1921).

They are governmental agencies of the United States, representing the sovereign power of the nation in the exercise

of an inherent right of sovereignty and are not to be controlled in the field granted to them by the acts of other governmental agencies of the same sovereign power. No more than the State of Maryland, through the taxing power, could indirectly control the instrumentality of Federal Government represented by the United States Bank, can the States of Tennessee and Missouri directly control the instrumentalities of National Government represented by the State Legislatures when ratifying an amendment to the Constitution of the United States.

McCulloch vs. Maryland, 4 Wheat., 316.

It follows as a result that the restrictions placed upon the ratifying power by the constitutions of Missouri and Tennessee are utterly void and of no effect. Those States by their constitutions can no more tie the hands of their legislatures in acting upon a proposed amendment to the Constitution of the United States than the State of Ohio, by its constitution, could tie the hands of its legislature by subjecting its action to a referendum vote of the people of the State.

The case of *Haire vs. Rice*, 204 U. S. 291, is relied upon in opposition to this. That case is clearly distinguished from the present one; it arose out of the following facts. By the enabling act of Congress admitting Montana and other States to the Union certain lands were granted to those States, to be held, appropriated and disposed of for certain purposes, viz.: the establishment of various educational institutions, in such manner as the legislatures of the various States should severally provide. The Constitution of Montana provided for the investment of the funds of said educational institutions, and that the interest from the invested funds should be used for the maintenance of those institutions; the right to use the principal for that purpose was denied. The legislature nevertheless attempted to use part of the principal, and the Supreme Court followed the decision of the State Court to the effect that it could not do this, being bound by the provisions of the State constitution. The position was taken in argument that the legislature was acting as the agent of the Federal government and not of the State, that the State had nothing to do with the lands in question, and could not limit the action of the legislature. In opposition to this the argument was made that the grant of land was made to the State, which thereupon owned those lands, without condition or restriction, and could of

course in consequence, either by constitutional provision or legislative enactment, place restrictions upon the use of the funds derived from them. This latter argument was upheld by the Supreme Court, which said, by Moody, J. (page 300):—

"It is vitally necessary to the conclusion reached by these arguments (i. e. that the legislature was the agent of the United States and not to be bound by State constitutional restrictions) that the enabling act should be interpreted as constituting the legislature as a body of individuals, and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the State of Montana, and the title to them, when selected, vested in the grantee." (Parenthesis ours.)

In other words, the holding in *Haire vs. Rice* was that the legislature was not acting as agent for the United States, but for the State itself. In the present case, where it is a question of ratifying a proposed amendment to the Federal Constitution, it is decided by the case of *Hawke vs. Smith* that the legislatures of the several States act, not as agents of the people of their respective States, but as agents of the whole people of the country, under the United States Constitution. We submit therefore, that the case of *Haire vs. Rice* has no bearing upon the present question.

2.—THE IRREGULARITIES IN THE RATIFYING PROCEEDINGS.

(a) *In Tennessee.*

The proceedings in Tennessee were, briefly, as follows: The Senate adopted the resolution of ratification on August 13, 1920 by a vote of 25 to 4. (Record pages 67, 120) a quorum being present. On August 18, 1920, the resolution was taken up in the House of Representatives, and a motion to lay the resolution on the table was lost by a vote of 48 to 48 (Record, pages 73, 124). Subsequently a vote was taken on the passage of the resolution, and the same was passed by a vote of 50 to 46. (Record, pages 74, 125); a motion to reconsider was then made, but before action was taken thereon a number of representatives left the State. On August 21, 1920, the motion to reconsider was taken up, and was defeated by a vote of either 49 or 50 to 0 (Record, pages 77, 128) nine members being present but not voting; this was after the house had overruled a decision of the chair to the effect that the motion

to call from the Journal the motion to reconsider was out of order for lack of a quorum, the vote being 49 to 8 against the chair, one member not voting, (Record, pages 76, 127.). Certification of the ratification of the Amendment was then sent by the Governor to Washington. Subsequently it is alleged that the House again took up the motion to reconsider and adopted it by a viva voce vote, afterwards reconsidering the resolution of ratification and defeating it by a vote of 47 to 24, twenty members being present but not voting, (Record, page 137.). By the Constitution of Tennessee, a quorum for each House is fixed at two-thirds of its membership, which is 66 for House of Representatives. (Record, page 27.)

It is claimed that the motion to reconsider had the effect of estopping final action on the resolution to ratify until disposed of; and that it was not disposed of on August 21, because of the absence of a quorum. We answer as follows:

In the case of *Hawke vs Smith*, 253 U. S. 221, it was held that the act of ratification by a State legislature is not an act of legislation within the proper sense of the word. It follows as a result that the parliamentary procedure adopted by State legislatures in accordance with provisions of their State constitutions,—in this case the effect of the motion to reconsider—does not apply and does not govern the acts of those bodies when passing upon a proposed Federal Amendment; for those rules were adopted to govern those bodies in legislation and should not be stretched to govern their actions in other respects.

The situation is very analogous to that presented in the early case of *Hollingsworth vs. Virginia*, 3 Dall. 378, which had to do with the Eleventh Amendment. The Constitution, Article I, sec. 7, declared that every order, resolution or vote to which the concurrence of the Senate and House of Representatives should be necessary, should be presented to the President of the United States, and before the same should take effect, should be approved by him, or if disapproved, repassed by two-thirds of the Senate and House of Representatives. A proposed Amendment would have seemed to have fallen within this class, requiring, as it does, the concurrence of the two Houses; and therefore to be without effect and improperly submitted to the States without the action of the President. Nevertheless

It was held to the contrary, on the ground that such a proposed amendment was a purely substantive act, unconnected with the ordinary business of legislation.

The case of *Davis vs. Hildebrand*, 241 U. S., 565, is clearly distinguished in *Hawke vs. Smith*, 253 U. S., 221, in which the Court says (at page 231):—

“Such legislative action (as involved in that case) is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression, no legislative action is authorized or required.”

We submit that, inasmuch as it is held by *Hawke vs. Smith*, that the action of the State legislatures on a proposed constitutional amendment consists only and wholly of the expression by them of their assent or dissent to the measure before them, the House of Representatives of Tennessee, in the original vote of August 18th, did express its assent to the ratification of the Nineteenth Amendment; for a majority of the whole membership of the House signified its assent to such ratification at that time, a quorum being present.

It is well settled, and is not denied in this case, that when a proposed constitutional amendment is once ratified by a State legislature—bearing in mind the words of the Supreme Court in *Hawke vs. Smith* to the effect that by ratification is meant the signifying of the assent of the State legislature merely—this action on their part is final and cannot be reversed or modified later.

Willoughby, Constitutional Law, Vol. I, p. 521.

Opinion of the Justices, 118 Me. 544, 107 Atl. 673.

The power of the State Legislatures to participate in amending the Federal Constitution exists only by virtue of a special grant in the Constitution. The power cannot be enlarged by implication but must be strictly pursued. So when a State legislature has done the act or thing which the power contemplated and authorized (i. e., when it has expressed its assent)—when the power has been once exercised—it *ipso facto* ceases to exist.

Jameson, Constitutional Conventions, Sec. 583.

When the Tennessee House on the first vote, passed the resolution of ratification, we submit that it thereby signified its assent to the Amendment; that its power had been exercised and become final; that no subsequent action on its part to reconsider or reverse its former action could be of any legal effect or force; but that being the thirty sixth State to ratify, the Nineteenth Amendment became from that minute a part of the Constitution of the United States.

Dillon vs. Glass, 256 U. S. (Decided May 16, 1921.)

(b) *In West Virginia.*

The proceedings in West Virginia were briefly as follows: The resolution to ratify the Nineteenth Amendment was voted upon in the Senate on March 1, 1920, and was defeated (Record, page 89); a motion to reconsider was also made and defeated, (Record, page 96). Subsequently a similar resolution was introduced in the House of Delegates, passed by that body, (Record, page 105) and then sent to the Senate for action (Record, pages 105, 97). The latter passed this resolution by a vote of 15 to 14, (Record, page 102) and a certificate of the passage of the resolution ratifying the amendment was forwarded to Washington by the Governor.

Senate Rule 52 provides in effect that when a resolution has once been passed upon, and a motion to reconsider disposed of, the same resolution cannot be presented or acted upon a second time during the session (Record, page 106). It is claimed that by the operation of this rule, the Senate was precluded from acting upon the resolution sent over by the House, and its action thereon was of no effect.

We submit that for reasons analogous to those which we have stated in the case of limitations imposed by State Constitutions, such a rule can have no effect in the case of action upon a proposed amendment to the Federal Constitution. But without this, we think it clear that the rule has no application in the instant case.

The meaning and intent of this rule is very obvious and the rule itself a very usual one. It is to prevent the clogging of business by the continued re-introduction and re-consideration of bills that have once been passed upon. It is not enforceable

against a bill coming from the other House, because the judgment of each House is obligatory upon, and affects only, the introduction of bills by its own members; this is the necessary result of the equality of standing of the two Houses. The effect and interpretation of, as well as the exceptions to, a rule of this character are clearly set forth by Cushing in his work on "*Law and Practice of Legislative Assemblies*", in Chapter Nineteen. With respect to the question here presented, the conclusion which we submit above is fully sustained, as follows (p. 896) :—

"2314. The judgment of one house being obligatory only upon itself, and its own members, it follows, that the application of the rule in question is confined to the house in which the previous proceeding has taken place, and to the members of that house. Thus, if a bill is pending, or has been rejected in one house, the same bill, that is, a bill of the same tenor, may nevertheless be introduced in the other; inasmuch as the latter has not as yet come to any judgment upon that or a similar bill. If such bill passes in the house in which it is begun, it may be sent from that house to the other, and so introduced in that house although a similar bill is there pending, or has been passed, or rejected; because the judgment of that house is obligatory only to prevent the introduction of such a bill by its own members, but not to its introduction from the other house, which is an independent and coordinate branch. If the introduction of a bill from the other house, in this manner, cannot be objected to, on the ground of order, so neither can its being proceeded upon and passed. Whether the house, to which it is sent, having already expressed its opinion by rejecting a similar bill, or having a similar bill then under consideration, will reconsider its judgment, and pass the bill thus sent, is a question which does not depend upon the order or method of proceeding."

We respectfully submit that this disposes absolutely of the contention that the Nineteenth Amendment was improperly ratified in West Virginia. There is no provision in the Senate rules indicating that Rule 52 prevents action on bills coming from the other House; the same is true of Reed's Rules, which have been put in evidence. The decision in *Smith vs. Mitchell*, 69 W. Va., 481, is in no wise to the contrary, as was very clearly pointed out in the opinion of the Court of Appeals of Maryland in the present case (Record, page 160).

A somewhat similar question was before the Supreme Court in the case of *Ruincy vs. United States*, 232 U. S. 310, in which

the question was as to the constitutionality of Sec. 37 of the Tariff Act of August 5, 1909, imposing an excise tax based on gross tonnage upon the use of foreign built pleasure yachts. The section was proposed by the Senate, as an amendment to the act, and was contended to be void, as a bill for raising revenue originating in the Senate in conflict with the constitutional provisions that all such bills should originate in the House. The Court held that it was sufficient to validate the section to show that it was adopted as an amendment to a bill for raising revenue originating in the House; and that having been duly enrolled and authenticated as an Act of Congress, it was not for the Court to determine whether the amendment was outside the purpose of the original bill.

CONCLUSION

It is but to repeat an often asserted rule of constitutional interpretation to say that every possible presumption of both law and fact must be raised in favor of the constitutionality of the Nineteenth Amendment and the regularity of its adoption. It cannot be stricken down as void unless it plainly contravenes some provision of the constitution and the mere existence of a reasonable doubt will not be sufficient to overthrow it. To invalidate it, there must be shown not only a reasonable doubt as to its constitutionality and the propriety of its ratification; there must be shown unconstitutionality or improper ratification existing beyond the shadow of reasonable doubt.

Knob vs. Lee, 12 Wall. 457.

This, we submit, the plaintiffs-in-error have not shown, and cannot show. They have asked that an amendment to the Federal Constitution be declared invalid which has been acted upon as follows:

- (a) Approved by two-thirds of each branch of Congress.
- (b) Declared ratified, and certified by the chief executives of 38 States, — more than three-fourths — as having been ratified, by the legislatures of those States.
- (c) Promulgated by the Secretary of State of the United States of America as part of the Federal Constitution.

(d) Accepted generally by the citizens of the several States as an accomplished fact.

(e) Recognized by the State of Maryland in that her chief executive called a special session of the legislature to make provision for the enfranchisement of women; in that her legislature at that special session passed the act which we have previously cited, making provision for the registration of female voters; and in that her judiciary in the instant case have upheld its validity.

(f) Actually put in operation by the tremendous vote of the women at elections in every State, so that if the Amendment be declared invalid, the validity of elections throughout the country will be called into question.

It cannot possibly be said that the subject matter of the Nineteenth Amendment is unconstitutional beyond a reasonable doubt, when we have, embodied in our organic law and upheld consistently by the Courts of the whole country the Fifteenth Amendment, of a character precisely similar, and the Eighteenth Amendment, carrying every whit as wide possibility of an extension of the powers of the Federal government into the realm of State's rights.

Nor can it, we respectfully submit, be said that the ratification of the Amendment has been shown beyond a reasonable doubt to be improper. The declarations of the State Legislatures, the certificates of the Governors, the Proclamation of the Secretary of State of the United States—these should be sufficient to raise a reasonable doubt against invalidating improprieties. The constitutional limitations contained in the various State Constitutions can be regarded in no other light than as meaningless and futile expressions. If invalidating improprieties exist, they must be found in the formal processes of voting in the State legislatures. We doubt that this is a fit subject for judicial investigation. But even were it so, it must be borne in mind that to show improper ratification sufficient to overcome the Amendment, *such improper ratification must be shown conclusively as to at least three States, because of the subsequent ratifications of Connecticut and Vermont.*

It is submitted, therefore, that the decision of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,

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Office Supreme Court, U. S.

WILLIAMS

JAN 8 1922

W. H. STANBURY

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,

against

J. MERCER GARNETT, ET AL.,
DEFENDANTS IN ERROR.

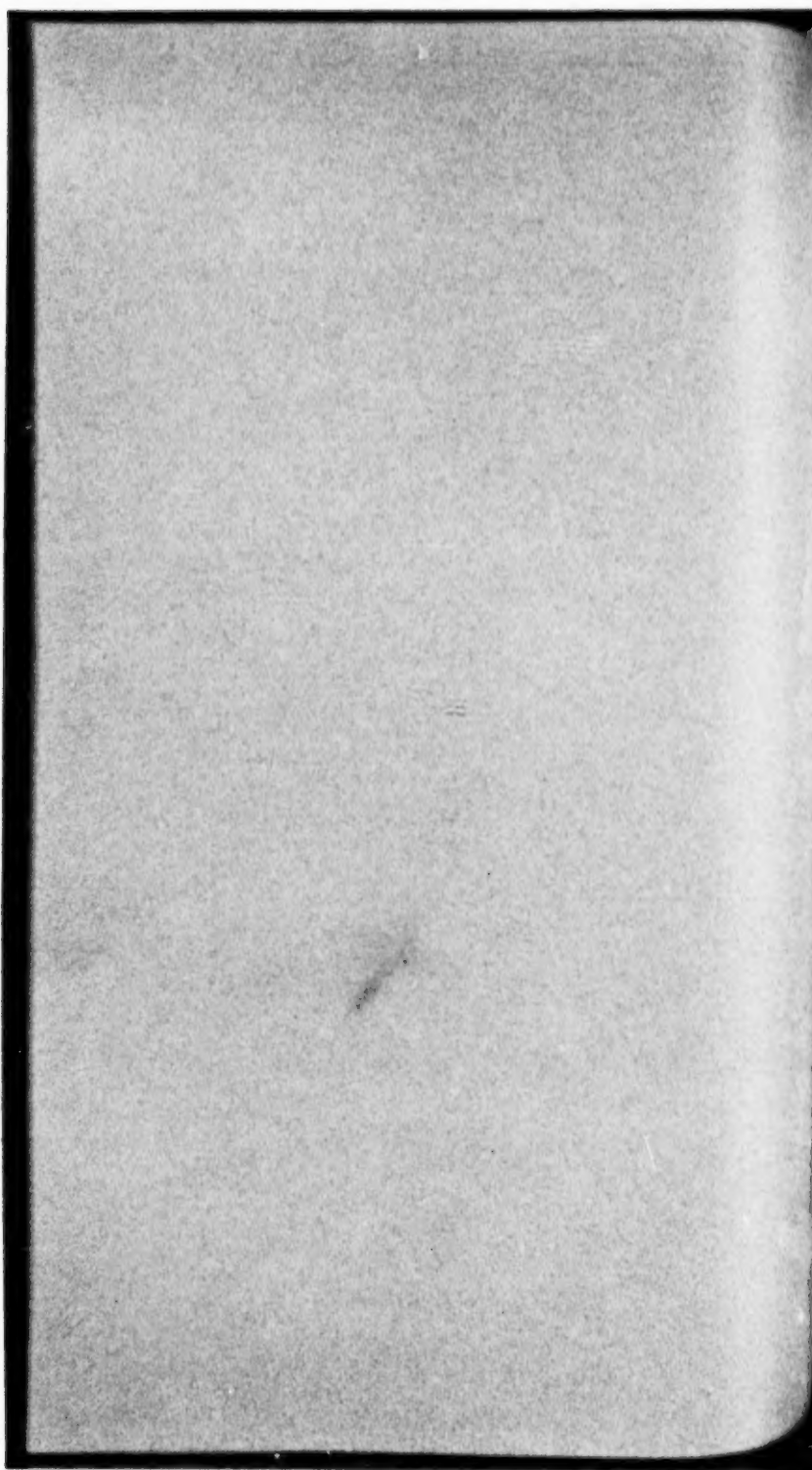
ON ERROR AND PETITION FOR CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND.

BRIEF FOR DEFENDANTS IN ERROR.

ALEXANDER ARMSTRONG,
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Assistant Attorney-General of
Maryland,

For Defendants in Error and Respondents.



ANALYTICAL INDEX.

	PAGE
Statement of the Case.....	1
1. The Maryland Constitution.....	1
2. Evidence of the Law of West Virginia.....	2
3. Certificate of Governor of Tennessee.....	4
Argument.....	4
I. The Nineteenth Amendment Does Not Ex- ceed the Limits of the Power to Amend the Constitution of the United States Reserved in Article V.....	4
1. There Are No Implied Limits.....	5
a. No Decision Upholds the Doctrine of Implied Limits	5
b. History Refutes the Doctrine.....	6
i. <i>The Nature of the Amending Power.</i>	6
ii. <i>The Method of Exercising the Amending Power.</i>	9
c. Analogy Does Not Sustain the Doctrine	15
d. Reason Refutes the Doctrine.....	18
e. Summary	21
2. The Nineteenth Amendment Does Not Ex- ceed the Express Limits of the Amending Power	21
a. The Proviso Contained in Article V....	21
b. The States Whose Rights Are Secured by the Proviso.....	23
c. Effect of the Seventeenth Amendment..	24
d. Effect of the Nineteenth Amendment...	25
e. The Law of Corporations Does Not Ap- ply	26

f. Summary	27
3. The Fifteenth Amendment as a Precedent.	28
a. The Validity of the Fifteenth Amend- ment	29
b. The Consent of the States	29
c. Race Discrimination and Sex Discrim- ination	32
d. Summary	33
II. The Nineteenth Amendment Has Been Rati- fied by the Legislatures of Three-fourths of the States	33
1. Tennessee and West Virginia in Fact Rati- fied the Amendment	33
2. The States Cannot, by Constitutional Pro- visions, Limit the Right of Their Legisla- tures to Ratify Amendments to the Con- stitution of the United States	35
III. Conclusion	39
Appendix A	i-ix

TABLE OF CASES.

Cohens vs. Virginia, 6 Wheat. 264.....	6, 15, 18
Dartmouth College vs. Woodward, 4 Wheat. 518....	26
Dodge vs. Woolsey, 18 How. 331.....	9
Guinn vs. United States, 238 U. S. 347.....	29
Haire vs. Rice, 204 U. S. 291.....	38
Hawke vs. Smith, 253 U. S. 221.....	35, 37
Hollingsworth vs. Virginia, 3 Dal. 378.....	8, 15, 34
Lane County vs. Oregon, 7 Wall. 71.....	23
McCulloch vs. Maryland, 4 Wheat. 316.....	7
McPherson vs. Blacker, 146 U. S. 1.....	36
Milligan, Ex Parte, 4 Wall. 2.....	31
Minor vs. Happersett, 21 Wall. 162.....	25
Myers vs. Anderson, 238 U. S. 368.....	2, 29
Neal vs. Delaware, 103 U. S. 370.....	29, 30
Osborne vs. Staley, 5 W. Va. 85.....	2, 3
Penhallow vs. Doane's Admrs., 3 Dal. 54.....	23
Rhode Island vs. Palmer, 253 U. S. 350.....	5, 6, 16
Richardson vs. Young, 122 Tenn. 471.....	34
Slaughter-House Cases, 16 Wall. 36.....	8, 16
Smith vs. Mitchell, 69 W. Va. 481.....	2, 3
Texas vs. White, 7 Wall. 700.....	20, 23
United States vs. Reese, 92 U. S. 214.....	29, 30
Warfield vs. Vandiver, 101 Md. 78.....	34
White vs. Hart, 13 Wall. 646.....	20

CONSTITUTIONS AND STATUTES.

United States Constitution—

Article I, Sec. 3.....	21
Article II, Sec. 1.....	36, 37
Article IV, Sec. 3.....	20
Article V.....	<i>passim</i>

Amendments—

Article XIV, Sec. 3.....	22
Article XV	23, 28 <i>et seq.</i> , 39
Article XVII.....	22 <i>et seq.</i>
Article XVIII.....	5, 16
Article XIX.....	4, 25, 27, 28, 31 <i>et seq.</i> , 35, 39

Maryland Statutes—

Acts 1920, Ext. Sess., Ch. 1.....	31
Code, Art. 33, Sec. 1-A.....	32
Code, Art. 33, Sec. 17.....	32

MEMBERS OF CONSTITUTIONAL CONVENTION.

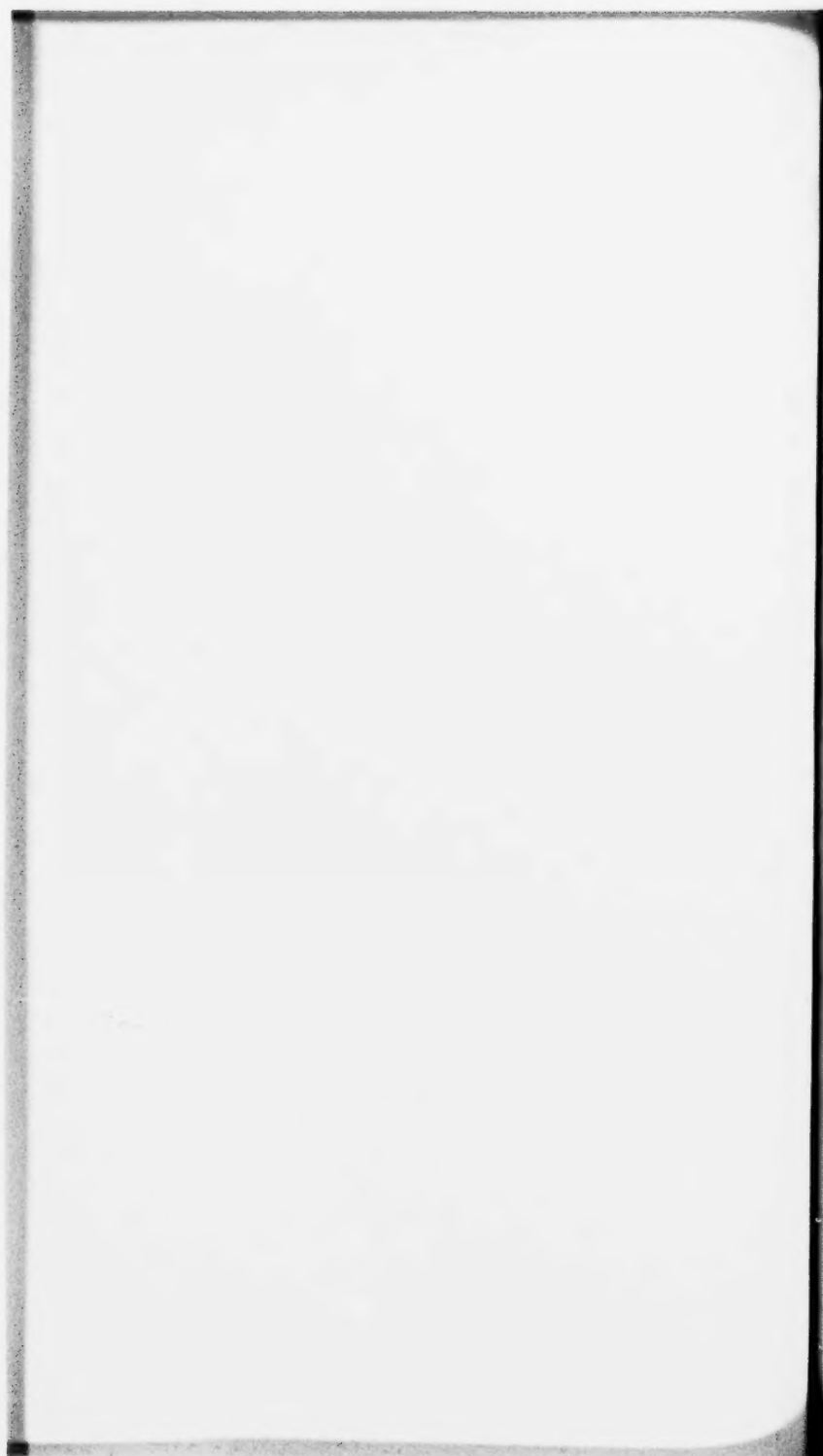
Gerry, Elbridge.....	10, 11, 13, 14, 19
Hamilton, Alexander.....	7, 11
Madison, James.....	12, 13, 14
Mason, George.....	10, 19
Morris, Gouverneur.....	13, 14
Sherman, Roger.....	11, 14
Wilson, James.....	11

Note: No References to the Appendix are given.

OTHER QUOTATIONS.

5 Elliot's Debates 182.....	10
5 Elliot's Debates 530.....	7, 12
Marbury, Wm. L., "The Nineteenth Amendment and After"	16
Va. Law Review, Vol. VII, No. 1.....	16





In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,

against

J. MERCER GARNETT, ET AL.,
DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The defendants in error concede the correctness of the greater part of the statement of the case contained in the brief for plaintiffs in error. There are, however, three portions of that statement on which they take issue.

1. THE MARYLAND CONSTITUTION.

On page two of the brief for plaintiffs in error occurs the following allegation:

“The Constitution of Maryland limits the right of suffrage to adult male citizens of sound mind, not convicted of larceny or other infamous crime or bribery of voters or illegal voting, and possessing certain qualifications as to residence, * * *.”

In fact, the Constitution of Maryland limits the right of suffrage to adult *white* male citizens of sound mind, not convicted of larceny or other infamous crime or bribery of voters or illegal voting, and possessing certain qualifications as to residence. The effect of the Fifteenth Amendment to the Constitution of the United States has been to obliterate the word "white" from the provisions of the Constitution of Maryland defining the limits of the elective franchise, but those provisions have not been changed by any act of the State of Maryland or the Legislature or people thereof, though the Courts of Maryland have recognized the effect of the Fifteenth Amendment upon the provisions in question.

See *Myers vs. Anderson*, 238 U. S. 368.

2. EVIDENCE OF THE LAW OF WEST VIRGINIA.

This is discussed on pages 11, 12 and 13 of the brief for plaintiffs in error. The plaintiffs in error introduced in evidence the decisions of the Supreme Court of Appeals of West Virginia in the case of *Osborne vs. Staley*, 5 W. Va. 85, and *Smith vs. Mitchell*, 69 W. Va. 481.

In *Osborne vs. Staley* it was contended that an act of the Legislature of West Virginia had not been passed in the manner required by the Constitution of the State. The Court noticed a provision of the Constitution requiring an affirmative vote in each house of a majority of the members elected thereto, and a provision requiring the vote to be recorded in the journal. It was plainly intimated that, but for these constitutional provisions, the Court would not examine the journal of the Senate, in order to ascertain the number of those voting for the bill in question. Because, however, of those constitutional provisions, the Court made this examination. Upon making it, the Court was of the opinion that the

bill had not received the vote required by the Constitution, but, in spite of this opinion, gave effect to the ruling of the presiding officer of the Senate, sustained on appeal to the floor, that the bill had received the number of votes required by the Constitution.

In *Smith vs. Mitchell*, a bill which had been passed by the lower house of the legislature was substituted in the Senate for a bill in the same words which had been twice read in the Senate. The bill thus substituted was then read once and passed. After its return to the House, a motion to reconsider was made in the Senate, but the House refused to return the bill. It was contended that there had been a failure to comply with a constitutional provision requiring that a bill should be read three times in each house. The Court held that the provision had been complied with, because *within the meaning of that provision*, the two bills were to be considered one. It was also contended that the refusal of the House to return the bill to the Senate was a violation of the constitutional provision conferring upon each house the power to make its own rules, on the ground that a rule of the Senate provided for reconsideration of the vote by which a bill was passed. The Court considered the question presented, namely, whether a constitutional right secured to one house of the Legislature had been invaded by the other house, and decided that it had not, because the bill which was the subject-matter of dispute was no longer within the control of the Senate, which, in a dispute with the lower House, had sought to invoke one of its rules.

Nowhere is it intimated that one of the houses of the Legislature, which is clothed with the power of making its own rules, has not also the power of interpreting those rules. On the contrary, the case of *Osborne vs. Staley* shows that, whenever possible, the Court will fol-

low the decision of one of the houses of the Legislature, even in the interpretation of a positive provision of the Constitution of the State.

3. CERTIFICATE OF THE GOVERNOR OF TENNESSEE.

The plaintiffs in error, on page 15 of their brief, in reviewing defendants' evidence, state that the transcript attached to the certificate of the Governor of Tennessee is not a true, full and correct transcript of all entries pertaining to Senate Joint Resolution No. 1 of the General Assembly of the State of Tennessee. The certificate of the Governor, which certifies that the transcript is true, full and correct, is dated August 24th, 1920, and it is submitted that the transcript was true, full and correct, containing all the proceedings of the Legislature at the date of the certificate. We cheerfully admit that the Governor of Tennessee did not include in the transcript attached to his certificate any record of events which had not occurred until after the day when his certificate was signed.

ARGUMENT.

I.

THE NINETEENTH AMENDMENT DOES NOT EXCEED THE LIMITS OF THE POWER TO AMEND THE CONSTITUTION OF THE UNITED STATES RESERVED IN ARTICLE V.

We shall consider, first, the contention of the plaintiffs in error that there are implied limits of the amending power, and that the Nineteenth Amendment exceeds those limits, and secondly, the contention that it exceeds the express limits contained in Article V of the Constitution.

1. THERE ARE NO IMPLIED LIMITS.

a. No Decision Upholds the Doctrine of Implied Limits.

The burden is on the plaintiffs in error to show that implied limits upon the amending power exist. We admit that there is no case which decides that such limits either do or do not exist. There is, therefore, no case in which the contention of the plaintiffs in error was upheld.

The Constitution had been in force for more than one hundred and thirty years, and seventeen amendments had been added to it before anyone even suggested the doctrine of implied limits.

When, for the first time, it was urged in this Court that implied limits to the amending power exist, the Court announced as one of its conclusions:

“The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.”

Rhode Island vs. Palmer, 253 U. S. 350.

Mr. Justice McKenna, who dissented from some of the conclusions of the Court, was so far from dissenting from this conclusion that he remarked that it seemed to assert the undisputed (page 393). Nowhere, either in the conclusions of the Court or in the opinions of the members thereof, is anything said which can be taken to uphold the contention of the plaintiffs in error in the instant case that there exist any implied limits to the power to amend the Constitution.

The plaintiffs in error, unable to cite judicial authority in support of their contention, endeavor to sustain it by reference to history, analogy and reason.

They seem, however, to overlook the arguments upon the other side which can be drawn from these sources.

"While weighing arguments, drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import."

Cohens vs. Virginia, 6 Wheat. 264, 384.

b. History Refutes the Doctrine.

i. *The Nature of the Amending Power.*

Throughout the argument of our opponents they have assumed that the power to amend the Constitution was a *delegated* power, a power delegated by the people to two-thirds of each house of the Congress, and to the Legislatures of three-fourths of the States or conventions thereof, as the one or the other mode may be proposed by the Congress. We submit that, on the contrary, it is, as stated in the above quoted passage from *Rhode Island vs. Palmer*, a *reserved* power, a power reserved by the people of the several States to themselves, as represented by legislatures or conventions, the proportion of such legislatures or conventions whose affirmative votes are necessary to the adoption of an amendment being fixed at three-fourths.

The adoption of an amendment to the Constitution involves, first, a proposal, and secondly, a ratification. The proposal may be made by the Congress upon a vote of two-thirds of each house, or by a Convention called by the Congress on the application of the legislatures of two-thirds of the several States. When, however, the Congress proposes an amendment, it does no more than

was done by the Constitutional Convention, which, through the then existing Congress of the United States, submitted the Constitution to the several States. This Court has said that:

“The instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it.”

McCulloch vs. Maryland, 4 Wheat. 316, 403.

This language exactly describes a proposed amendment, when it comes from the hands of the Congress.

The power to ratify a proposed amendment is reserved to the people of the several States, acting through legislatures or conventions. It has always been considered a power reserved to the people. The Article providing for the amendment of the Constitution which was first proposed to the Convention provided that:

“On application of the legislatures of two-thirds of the States in the Union for an amendment to this Constitution, the legislature of the United States shall call a convention for that purpose.”

Hamilton, who contended that the national legislature should have the power to call a convention, by a vote of two-thirds of each branch, without the application of the State legislatures, said:

“There could be no danger in giving this power as the *people* would finally decide in the case.” (Italics ours.)

5 *Elliot's Debates*, 530.

The changes proposed by Hamilton and a number of other changes were made before the article relating to amendments was finally incorporated in the Constitution as Article V.

The debate upon this Article, both in Committee of the Whole and in Convention, is given in Appendix A, annexed to this brief.

As the Article finally stood, the power of ratifying amendments therein contained was still considered as a power reserved to the people.

In *Hollingsworth vs. Virginia*, 3 Dal. 378, Attorney General Lee, discussing the amending power, said:

"The people limit and restrain the power of the legislature acting under a delegated authority; but they impose no restraint on themselves." (Italics ours.)

In the *Slaughter-House Cases*, 16 Wall. 36, this Court, referring to the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, said that:

"Within the last eight years, three other articles of amendment of vast importance have been added, by the voice of the people, to that now venerable instrument." (Italics ours.)

The above quotations are sufficient to show that the power of ratifying amendments is a power reserved to the people. In ratifying amendments, the people, it is true, act in their several States in one of the modes prescribed in Article V. They provided, when they adopted the Constitution, that one or the other of these modes should be employed. The people "have excluded themselves from any direct or immediate agency in making amendments * * * and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them; or where the Legislatures of two-thirds of the several States shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Con-

stitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress.”

Dodge vs. Woolsey, 18 How. 331.

This amounts to a delegation of the power of proposing amendments, coupled with a reservation of the power of ratifying such amendments. There is no general delegation of this last mentioned power by the people of the several States to any body outside of those States. The power is reserved to the people of the several States, though the vote of each State is to be cast by its legislature or by a convention.

Suppose that thirteen men associate themselves for some purpose under articles of agreement. They provide that those articles of agreement may be amended by a supplemental agreement to be executed by three-fourths of those who are parties to the original agreement or who may subsequently become parties to it. This certainly does not constitute a delegation of the power to alter the agreement, being simply a provision that the parties thereto shall be bound by the action of a certain proportion of their number. If the parties to the agreement also provide that each shall be bound by the act of an attorney therein named by him, that amounts to a delegation by each of the power to assent to alterations, and it goes no further. The power is still reserved to the several parties to the agreement, although each must act through a designated agency.

ii. *The Method of Exercising the Amending Power.*

The necessity of providing for amendments was recognized at an early stage of the proceedings of the Constitutional Convention. It was proposed, in Committee of

the Whole, "that provisions ought to be made for hereafter amending the system now to be established without requiring the assent of the national legislature."

"Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to change and violence."

5 Elliot's Debates, 182.

In this there is a clear recognition of the fact that, when changes should be found necessary, they would be made, and that, if a provision for making such changes were not incorporated in the Constitution, the impossibility of altering that instrument by constitutional means would lead to its alteration by other means, involving possible violence. It seemed necessary, therefore, to provide a constitutional method of making such alterations as might be demanded, no matter how far-reaching such alterations might be.

That they might be far-reaching the Convention fully realized. The possible consequences of an unrestrained power to amend were called to the attention of the assembled delegates in convention by Mr. Gerry, who moved to reconsider Article 19, which provided:

On the application of the legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.

"This Constitution, he said, is to be paramount to the State Constitutions. It follows, hence, from this Article, that two thirds of the States may obtain a con-

vention, a majority of which can bind the Union to innovations that may subvert the State Constitutions altogether."

Hamilton "did not object to the consequences stated by Mr. Gerry," but it is evident that he clearly recognized them. His answer to Gerry's objection was that: "There was no greater evil in subjecting the people of the United States to the major voice, than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case."

The motion to reconsider having prevailed by a vote of nine States to one, Sherman moved to add to the Article: "or the legislature may propose amendments to the several States for their approbation; but no amendments shall be binding until consented to by the several States."

It is apparent that this language would have left room for construction. It might have been interpreted as requiring either unanimous consent or the consent of a majority. Accordingly, Wilson moved to insert "two-thirds of" before the words "several States," a motion

which was lost by only one vote, being supported by five States and opposed by six. He then moved to insert "three-fourths of" before "the several States," which was agreed to, *nem. con.*

5 *Elliot's Debates*, 530.

The Article, as it stood at this stage of the proceedings, required ratification by three-fourths of the States, but the method of ratifying had not been determined. Madison then introduced the following substitute:

"The legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States."

A proviso having been added, "that no amendments which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article," the proposed substitute was adopted by a vote of nine States to one. As subsequently presented to the Convention under the title of Article V, the proposed article reads as follows:

"The Congress, whenever two-thirds of both Houses shall deem necessary, or on application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification

may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of Article I."

The Convention had now determined the agencies which should be employed by the several States to act for them in the ratification of proposed amendments. This was done *after* it had been determined that the ratification of the States should be necessary and *after* the proportion of States necessary to ratification had been fixed. During the discussion of the proposed article in the form last quoted, Gouverneur Morris and Gerry moved to amend it, so as to require a convention on application of two-thirds of the States. Madison found an objection to the provision for a convention, "that difficulties may arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided." The motion of Morris and Gerry was agreed to, *nam. con.*, but the above stated objection to conventions may have led to the subsequent action of Gerry, who moved to strike out the words "or by conventions in three-fourths thereof." This motion was lost by a vote of ten States to one, but it appears from the above that the Convention had at least considered a proposition which would have made the legislatures of the several States the sole agencies for recording the assent of the States to the ratification of amendments.

It appears, then, that the members of the Convention fully realized the possible consequences of the power to amend the Constitution which was reserved under the terms of Article V, that they realized that, by the use of this amending power, innovations might be introduced that might "subvert the Constitution altogether," but that they considered that the method of making amendments provided by that article was a sufficient safeguard against the introduction of such innovations. They

doubtless felt safe against the introduction of amendments which might subvert the State governments, when they made it impossible to adopt such amendments without the consent of three-fourths of the States.

There is no doubt that they still realized how far-reaching might be the amendments which Article V reserved the power to adopt. After the motion of Morris and Gerry had prevailed, Sherman moved to annex to the end of the article a further proviso—"that no State shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate."

Madison said: "Begin with these special provisos, and every State will insist on them, for their boundaries, exports, etc."

Madison did not take the ground that the article, as it stood, was not sufficiently broad to make possible the adoption of amendments which would affect the States in their internal police or might even change their boundaries, for there could have been no objection to provisos which would have had no other effect than to express what was already implied. Evidently he objected to the introduction of further restrictions upon the amending power. It is equally evident that Sherman realized that, without the proviso which he had sought to introduce, there was nothing to prevent the adoption of amendments which might affect the States in their internal police, for, when his motion was defeated, he moved to strike out Article V altogether. After this motion had also been defeated, Gouverneur Morris moved to annex a further proviso—"that no State, without its consent, shall be deprived of its equal suffrage in the Senate," which was agreed to without debate and without opposition.

The whole course of the debate, therefore, shows clearly and explicitly that there are no implied or inherent limits of the amending power, and that the framers of the Constitution intended that there should be none. There is nowhere the slightest suggestion that any implied limitation of that power exists; the implications are all opposed to any such idea.

Applying the language above quoted from *Cohens vs. Virginia*, we are led irresistibly to the conclusion that Article V means what it says, and that, under its terms, is reserved a power of amendment which is limited only by the express provisos contained in the article.

c. *Analogy Does Not Sustain the Doctrine.*

The plaintiffs in error have cited decisions which established the doctrine of implied limitations upon the power of taxation, and have sought to show that, by analogy, there exist implied limitations upon the power to amend. But there can be no analogy between a delegated power and a reserved power.

We are not without decisions of this Court which show how far the respective powers of the national government and those of the several States may be altered by amendments to the Constitution. In *Hollingsworth vs. Virginia*, 3 Dal. 378, this Court upheld an amendment which imposed an important limitation upon the jurisdiction of the federal judiciary. That decision involved the establishment of the principle that all judicial authority exercised in the United States could be taken away by an amendment to the Constitution. The principle was very definitely and explicitly stated in argument, the Attorney General saying:

“The people limit and restrain the power of the legislature acting under a delegated authority; but

they impose no restraint on themselves. They could have said by an amendment to the Constitution, that no judicial authority should be exercised, in any case, under the United States; and, if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general ground, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States!"

Of course, if the jurisdiction of the Federal Courts may be indefinitely restricted or entirely abolished, it may also be indefinitely extended, and its indefinite extension would mean the practical annihilation of the jurisdiction of the State judiciary.

The power so to amend the Constitution as to deprive the States of all legislative powers is implied in the decision of *Rhode Island vs. Palmer, supra*. This is admitted by Mr. William L. Marbury, of counsel for the plaintiffs in error. In a pamphlet entitled "The Nineteenth Amendment and After," reprinted from the *Virginia Law Review*, Volume VII, No. 1, Mr. Marbury states (p. 21), that "the Prohibition Amendment does undoubtedly have the effect of diminishing the reserved legislative powers of the State by transferring one of the subjects of that power to the Central Government, *thereby establishing a precedent for the adoption of other Amendments in the future by means of which all the legislative powers of the States may be taken away.*" (The italics are Mr. Marbury's.) We have, then, decisions of this Court which show that, under the amending power, the States may be deprived of all judicial authority and of all legislative power.

The absolutely unlimited character of the power to amend is clearly indicated by the language used in the *Slaughter-House Cases*, 16 Wall. 36:

“The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt.*

“We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States, which ratified them.” (*Italics ours.*)

The Court was not discussing the effect of Article V, but the effect of amendments adopted under the power to amend reserved by the terms of that article. When, therefore, the Court refused so to construe those amendments as to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; and so as radically to change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, in the absence of language which expresses such a purpose too clearly to admit of doubt, the implication is clear that, if the language of the amendments which the Court was discussing had expressed these purposes too clearly to admit of doubt, the Court would have given effect to that lan-

guage. When the Court expressed the conviction that no such results were intended by the Congress which proposed these amendments nor by the Legislatures of the States, which ratified them, the implication is clear that, if the Court had been convinced that these results were intended, it would have given effect to that intention.

If the Court had felt any doubt whatever as to the extent of the power to amend reserved by Article V, there could have been no more appropriate occasion for the intimation of such a doubt.

d. Reason Refutes the Doctrine.

"The people," said Chief Justice MARSHALL, "made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Cohens vs. Virginia, 6 Wheat. 264, 389.

The people, as Chief Justice MARSHALL said, can unmake the Constitution. Does this mean that the unmaking of the Constitution requires the affirmative voice or the affirmative action of every citizen of the United States? Does it even mean that the affirmative voice or the affirmative action of every State of the Union is required? Such a contention would be absurd, for a purpose to change the whole form of government or even to destroy the Union of the States altogether would be bound to prevail, if all the States but one participated in that purpose. Such a purpose would be bound to pre-

vail, if three-fourths of the States participated in it. If no constitutional machinery existed for giving effect to such a purpose, it would, if supported by so large a proportion of the States, prevail by revolutionary means. It was because no constitutional means existed for amending the Articles of Confederation, except by the consent of every State, that the whole form of government was changed by a revolution, fortunately free from violence. To prevent a change by revolutionary means, possibly accompanied by violence, of the government then formed, a constitutional means of changing the instrument of government was incorporated in that instrument itself. Those who framed it thought it better, in the words of Colonel Mason, to provide for amendments "in an easy, regular, and constitutional way, than to trust to change and violence." They realized that, if a sufficiently large majority favored a change, even a change which should wholly alter the entire plan of government, that change would be made; that if it could not be made under the provisions of the Constitution, it would be made by subverting the Constitution; that if it could not be made by peaceable means, it would be made by force. They, therefore, provided a constitutional means for making all alterations which the people might in the future demand, realizing fully that those alterations might be of so radical a character as, in the words of Gerry, to "subvert the State constitutions altogether."

Although they realized that such alterations *could* be made, they did not expect that they *would* be made. They regarded them as constitutional possibilities, but scarcely as practical possibilities. They had prepared a plan of government which they hoped would be found successful, and which they had done all in their power to make successful.

"The National Constitution * * * assumed that the government and the Union which it created, and

the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so."

White vs. Hart, 13 Wall. 646, 650.

"The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."

Texas vs. White, 7 Wall. 700, 725.

That is to say, the Constitution contemplates the indestructibility of the Union and the indestructibility of the States. The framers of that instrument assumed and intended that both the States and the Union should be indestructible. They hoped that the plan of government founded upon that assumption and intention would prove a practical success. If, however, a time should ever come when, in the opinion of an overwhelming majority, that plan of government had not proved successful in practice, they realized that it would be changed, and they left the way open to change it by constitutional means, even though the alterations thereby effected might be so radical as to amount to a practical destruction of that Union of the States which was the essential feature of the plan.

That this essential feature might be destroyed without resort to the amending power is evident from a very brief consideration of the terms of Section 3 of Article IV. For, since a State may be formed by the junction of two or more States, with the consent of the Legislatures of the States concerned as well as of the Congress, it follows that Congress, with the consent of the Legislatures of the several States, may combine every State in the Union into one State, and this may be done by the votes of a mere majority of each branch of Congress and of the Legislatures of the several States. If

this were done, the States as they now exist and the Union of the States would be destroyed. The Constitution did not look to, did not contemplate any such event; but that its provisions make it possible to accomplish just such a result by constitutional means is so clear as to be indisputable.

e. Summary.

The falsity of the assumption that the amending power is a delegated power invalidates all of the ingenious argument as to the implied limits of that power which has been made on behalf of the plaintiffs in error. When it is realized that this is a power reserved, and not delegated, the whole of that argument falls to the ground.

2. THE NINETEENTH AMENDMENT DOES NOT EXCEED THE EXPRESS LIMITS OF THE AMENDING POWER.

a. THE PROVISIO CONTAINED IN ARTICLE V.

The power to amend the Constitution reserved in Article V was expressly limited by provisos, of which the only one still in effect reads as follows:

“That no State without its consent shall be deprived of its equal suffrage in the Senate.”

The provision whereby each State is entitled to an equal voice in the Senate was contained in Section 3 of Article I of the Constitution, the first paragraph of which section reads:

“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.”

The right secured to each State by the above quoted proviso to Article V was the right to be represented in

the Senate by those who should have a voice in that body equal to that of every other State. Of this right the State could not be deprived even by the exercise of the amending power, without its consent. Further than this the proviso does not go. The number of Senators from each State could have been increased, or the numbers could have been made unequal, provided equality of the votes of the several States had been preserved by giving an equal value to the votes to be cast by each State, as was done in the Constitutional Convention, and as must be done in the House of Representatives, when the duty of electing the President devolves upon that body. Other changes not affecting the right of the several States to an equal voice can be made, and such changes have been made.

By the Fourteenth Amendment restrictions were imposed upon the States as to the persons by whom they might be represented in the Senate, for, by Section 3, every person "who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof," was excluded from that body until such time as Congress might, by a vote of two-thirds of each House, remove such disability.

By the Seventeenth Amendment, the election of Senators was taken out of the hands of the Legislatures of the several States and conferred upon the people thereof, the electors in each State to have the qualifications requisite for electors of the most numerous branch of the State Legislatures. The plaintiffs in error, in the third prayer submitted by them to the Court of Common Pleas, assume and concede the validity of this amend-

ment. It is to be noted that the number of electors entitled to vote for members of the State Legislatures had, before the adoption of the Seventeenth Amendment, been greatly augmented by the effect of the Fifteenth Amendment.

**b. THE STATES WHOSE RIGHTS ARE SECURED BY
THE PROVISIO.**

By the terms of the proviso equal suffrage in the Senate is secured to each State. What is meant by the word "State"? The answer is to be found in the decisions of this Court.

"By a State forming a republic (speaking of it as a moral person) I do not mean the legislature of the state, the executive of the state, or the judiciary, but *all the citizens* which compose that state, and are, if I may so express myself, integral parts of it; all together forming a body politic." (Italics ours.)

Penhallow vs. Doane's Administrators, 3 Dal.
54, 93.

"*The people* of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence." (Italics ours.)

Lane County vs. Oregon, 7 Wall. 71, 76.

"A State, in the ordinary sense of the Constitution, is a political community of *free citizens*, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." (Italics ours.)

Texas vs. White, 7 Wall. 700, 721.

The point to be emphasized is that the State is composed of all its people, all its free citizens, and not merely of its voting citizens—its citizens invested with political

rights. It is this whole body of the citizenship of a State which is protected by the proviso that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

c. EFFECT OF THE SEVENTEENTH AMENDMENT.

We have seen that, prior to the adoption of the Seventeenth Amendment, the Legislatures of the several States were charged with the duty of electing Senators; that the Seventeenth Amendment transferred this duty to those persons in each State who should have the qualifications requisite for electors of the most numerous branch of the State Legislatures; and that the validity of this amendment is conceded by the plaintiffs in error. By this amendment a very important change was effected. The mode of electing Senators was wholly changed, and there can be no doubt that the framers of the Constitution would have looked upon this change as of the greatest importance. To them it seemed wise to entrust the election of the highest officials to a comparatively small number of men, entrusted, because of their superior ability, with the performance of that duty. Witness the elaborate provisions for the election of the President and Vice-President. In the same spirit in which they conferred upon electors specially chosen for that purpose the power of electing the Chief Magistrate, they conferred upon the Legislatures the power of choosing Senators.

All this was completely changed by the Seventeenth Amendment. It is true that, by that amendment, the power of electing Senators was conferred upon those persons entitled to vote for the most numerous branch of that body which, prior to the adoption of the amendment, had, itself, possessed the power of electing Senators. But the people of a State might be willing to give to a numerous class of the citizens of that State the

power to elect the Legislature thereof, and, at the same time, might object to the election by the same class of persons of those who were to represent the State in the Senate of the United States.

The Seventeenth Amendment, however, is valid, as the plaintiffs in error concede it to be. Though it confers the power of electing Senators upon persons on whom the States did not confer that power and on whom the Constitution of the United States had not previously conferred it, it leaves the States with an equal voice in the deliberations of the Senate, and, therefore, deprives no State of the right secured to it by the proviso contained in Article V.

d. EFFECT OF THE NINETEENTH AMENDMENT.

The Nineteenth Amendment reads as follows:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

“Congress shall have power to enforce this article by appropriate legislation.”

This amendment in effect strikes out the discriminating word “male” from those State Constitutions and statutes which confine the suffrage to persons of the male sex. Since its adoption, therefore, that right has been enjoyed by a greatly augmented number of those people—those free citizens—who, in the words of this Court, “compose a State.”

The adoption of the Nineteenth Amendment did not confer citizenship upon women. Before its adoption they might be citizens.

Minor vs. Happersett, 21 Wall. 162.

Since the adoption of the amendment, women who are citizens of a State and who possess the other qualifications which, under the Constitution and statutes of that State, entitle them to the right of suffrage, may exercise that right, in spite of provisions in State Constitutions or statutes which, prior to the adoption of the amendment, would have deprived them thereof. But, before enjoying the right of suffrage, they were among those people who composed the State, and were, as citizens of the State, represented in the Senate of the United States. The Legislatures which, prior to the adoption of the Seventeenth Amendment, chose the Senators represented the whole citizenship of the State, and not merely those citizens who directly participated in their election. The part played by unenfranchised women in all public affairs, the great influence which, though deprived of the vote, they exercised in those affairs were a subject on which they were often gravely lectured by those who opposed their enfranchisement. The extension of the suffrage to these citizens of the State does not, therefore, deprive the State of its equal suffrage in the Senate, any more than does the transfer of the power of electing Senators from the hands of the Legislatures to those of the electors of the most numerous branch thereof.

e. THE LAW OF CORPORATIONS DOES NOT APPLY.

The argument which the plaintiffs in error seek to base upon the decision in *Dartmouth College vs. Woodward*, 4 Wheat. 518, may be briefly answered. The legislation there in question sought to enlarge a self-perpetuating board of trustees, who composed the managing body of a corporation, by the admission of members previously unconnected with that corporation, and to fill such vacancies as might occur by the appointment of others previously unconnected with the corporation, so

that eventually the board of trustees would be composed entirely of persons who had, prior to the enactment of this legislation, no connection whatever with the corporation. The Court held that this violated the constitutional provision which prohibited the State from passing any law impairing the obligation of contracts. The case is not analogous, if for no other reason than because the trustees who were added to the membership of the board by the legislation in question were not members of the corporation before the enactment of that legislation.

It may be useful, however, to give a little further consideration to this subject. Suppose that Dartmouth College had been entitled, like the Universities of Oxford and Cambridge, to representation in the legislature, and that, under the Constitution of the State of New Hampshire, the right had been reserved to amend the charter of that corporation, with the proviso that it should not be deprived, without its consent, of that representation. Suppose that a statute had taken the right of electing representatives from the governing body of the college and conferred it upon a certain portion of the student body. If, thereafter, another statute had extended the right to the entire student body, members of that portion thereof upon whom it had previously been conferred would certainly not have been heard to complain. They would have been told that, if the act conferring this right upon them was valid, the act extending that right to their fellow-students was certainly so.

f. SUMMARY.

The Nineteenth Amendment may be said to dilute and diminish the right of electing Senators conferred upon the male voters of the State, not by the Constitution of the State and not by the Constitution of the United States, as originally adopted, but by the Seventeenth

Amendment, taken in connection with the Fifteenth Amendment. The proviso to Article V, therefore, does not protect such persons in a right which they did not possess at the time of the adoption of the Constitution of which Article V is a part.

The extension of the right to vote to citizens of a State who were not previously entitled to its exercise does not deprive that State of its equal suffrage in the Senate, and, not being, therefore, within the proviso to Article V, is within the power to amend reserved by the terms of that Article.

We have not thought it necessary to answer at length the contention of plaintiffs in error that, under the provisions of the Nineteenth Amendment, the power of the States to consent to a future amendment which might seek to deprive them of their equal suffrage in the Senate might be taken away, for we do not consider that this question is before the Court. If, at any time in the future, the contention should be made that a State has consented to an amendment which deprived it of its equal suffrage in the Senate, and if this contention should be met by the assertion that the State had not consented, because by the adoption of the Nineteenth Amendment it had been deprived of its power to consent, the Court could then consider the question which the plaintiffs in error now seek to raise.

3. THE FIFTEENTH AMENDMENT AS A PRECEDENT.

The Nineteenth Amendment is in the same words as the Fifteenth, except that the word "sex" is substituted for the words "race, color or previous condition of servitude." It would seem, therefore, that if the Fifteenth Amendment is within the power reserved by Article V, the Nineteenth Amendment must also be within that power.

a. The Validity of the Fifteenth Amendment.

This Court has repeatedly referred to the Fifteenth Amendment as a part of the Constitution. A few of the cases in which such references have been made are:

United States vs. Rees, 92 U. S. 214;
Neal vs. Delaware, 103 U. S. 370;
Guinn vs. United States, 238 U. S. 347;
Myers vs. Anderson, 238 U. S. 368.

The earliest of the cases above cited was decided in 1876, only six years after the adoption of the Fifteenth Amendment. Nowhere in any of these decisions does the Court intimate any doubt as to the validity of the amendment. It is contended that in the earlier cases the validity of the amendment was not directly involved. But suppose that there had been an amendment to the Constitution, providing that every State which had attempted to secede from the Union should, either permanently or for a definite term of years, be deprived of the right to elect Senators. Would this Court ever have referred to such an amendment except to declare it unconstitutional as a violation of the terms of the proviso contained in Article V? Whatever may be said as to the decisions in the earlier cases, however, it is clear that the later decisions of this Court, and particularly *Myers vs. Anderson*, *supra*, directly involved the validity of the amendment, and that this question, if ever in doubt, is no longer so.

b. The Consent of the States.

The plaintiffs in error contend that, although a number of States, including Maryland, never ratified the Fifteenth Amendment, they must be held to have consented thereto. The argument seems to be that this consent is to be inferred from the absence of protest and resistance.

Certainly the doctrine which the plaintiffs in error seek to establish is extremely vague. For what length of time must a State abstain from protest against or resistance to an amendment in order to give rise to the presumption that it has consented thereto? Is it twenty years? Is it fifteen years? If so, the State of Delaware which rejected the amendment, had not consented thereto at the time of the decision in *Neal vs. Delaware, supra*. Is it ten years or seven years? If so, the State of Kentucky, which also rejected the amendment, had not consented thereto at the time of the decision in *United States vs. Reese, supra*. Yet the validity of the Fifteenth Amendment as a part of the Constitution of the United States was not questioned in either of these cases. Must a State, immediately upon the adoption of an amendment to which its consent is required rise in arms to resist all acts which are valid only by reason of the provisions of that amendment, and must its failure immediately and forcibly to resist such acts be considered as an evidence of its consent to the adoption of that amendment? Surely not.

It is contended that the Fifteenth Amendment, although adopted nearly five years after the close of the Civil War, must be considered as, in effect, forming part of a treaty of peace between the Government of the United States and the States which had attempted to secede. This seems to amount to a contention that the Constitution means one thing in times of peace and something else in times of war, or that the effect of its provisions is suspended in times of war. Such a contention can scarcely be maintained in view of the positive language of this Court.

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circum-

stances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

Ex parte Milligan, 4 Wall. 2.

If, however, the failure of those States which rejected the Fifteenth Amendment to resist its effects, because of the threat or fear of force, is to be construed as evidence that they consented thereto, that fact, so far from supporting the argument of the plaintiffs in error, tells directly against it. Consent obtained by the threat or fear of force can certainly be no more effective than consent which is freely given. No State has resisted the operation of the Nineteenth Amendment; every State has accepted its provisions and acted in accordance therewith.

If the consent of a State to the adoption of an amendment can be evidenced in any other way than by the formal ratification of such amendment, then the State of Maryland has certainly furnished the plainest evidence that it consented to the adoption of the Nineteenth Amendment and considered itself bound by the provisions thereof. In September, 1920, the General Assembly of Maryland, which at its regular session of that year had rejected the Nineteenth Amendment, was called by the Governor in Extraordinary Session. At this Extraordinary Session, the General Assembly did not rescind its former action rejecting the amendment, but, by Chapter 1 of the Acts passed at the Extraordi-

nary Session, a statute far too long for quotation in full, it amended in many particulars the provisions of Article 33 of the Code of Public General Laws of Maryland relating to elections, and some of these amendments constitute a clear recognition of the right of women to vote. An additional section, to be known as Section 1-A of the above-mentioned article, was enacted in the following terms:

“Wherever in this Article words or phrases are used denoting the masculine gender they shall be taken to include the feminine gender.”

Section 17 of Article 33, providing for the registration of voters, was amended by the addition of the following sentences:

“In the case of a woman who claims citizenship by marriage, the Board shall note the name of the person to whom married and where and in what court he was naturalized, or where previously registered. Under the column headed ‘Remarks’ they shall note whether the applicant is male or female.”

Certainly no language could more clearly evidence a recognition upon the part of the General Assembly of the right of women to vote. If anything except a formal resolution of ratification can evidence the consent of a State to the adoption of an amendment to the Constitution of the United States, then Maryland has consented to the adoption of the Nineteenth Amendment.

c. Race Discrimination and Sex Discrimination.

Little need be said in answer to the attempt of plaintiffs in error to distinguish between an amendment preventing discrimination on account of race, and an amendment preventing discrimination on account of sex. It seems a strange doctrine that the Fifteenth Amendment, which, in effect, conferred the right to vote upon persons

who had just attained citizenship, who had just emerged from slavery, did not invade the rights of the States, but that those rights are invaded by the Nineteenth Amendment, which confers the right to vote upon a class of persons who, as long as the State has existed, have been free citizens thereof.

d. Summary.

The practical identity of the terms of the Nineteenth Amendment with those of the Fifteenth is conclusive of its validity. But for the novelty of the questions raised by plaintiffs in error, we might well rest the contention that the Nineteenth Amendment is within the amending power upon this consideration alone.

II.

THE NINETEENTH AMENDMENT HAS BEEN RATIFIED BY THE LEGISLATURES OF THREE-FOURTHS OF THE STATES.

The plaintiffs in error, in their attempt to support the converse of this proposition, contend, first, that *in fact* the Legislatures of Tennessee and West Virginia did not ratify the amendment, and secondly, that the Legislatures of Tennessee, West Virginia, Missouri, Texas and Rhode Island were not competent to ratify the amendment by reason of certain provisions of the Constitutions of those States.

1. TENNESSEE AND WEST VIRGINIA IN FACT RATIFIED THE AMENDMENT.

The case of West Virginia is beyond all dispute. We have shown that, even in the case of ordinary legislation, the Courts of West Virginia will not examine the journals of the houses which compose the legislative body of that State except for the purpose of determining whether those houses have failed to comply with same

constitutional provision. The only constitutional provision upon which the plaintiffs in error rely is that which confers upon each house the power to make its own rules. This provision certainly cannot confer upon the courts the power to interpret those rules, and, in the absence of any provision conferring that power on the courts, the power resides, in West Virginia as elsewhere, in the house which makes the rules.

The Courts of Tennessee might, indeed, feel free to examine the journals of the houses which compose the Legislature of that State, if the case involved ordinary legislation. The constitutional provisions under which they might make such examination do not apply, however, to a case involving the action of the Legislature upon an amendment to the Constitution of the United States. The language of the Federal Constitution, with regard to the approval by the President of Congressional action is, on its face, as broad as it well could be. It applies in terms to "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)." This Court, however, in *Hollingsworth vs. Virginia*, *supra*, held that this language did not apply to a constitutional amendment.

See also—

Warfield vs. Vandiver, 101 Md. 78;

Richardson vs. Young, 122 Tenn. 471, 530-537.

We need say nothing more in regard to this branch of the subject except by way of quotation from the learned Judge who delivered the opinion of the Court of Appeals of Maryland:

"Inasmuch as it appears that in addition to the 36 States already referred to as having ratified the

19th Amendment the State of Connecticut has also ratified it, it becomes unnecessary to consider at length the effect of the action of the Legislature of Tennessee in regard to it. In dealing with the question before it the Legislature was not bound by its rules or by its laws relating to legislation, because the ratification of an amendment to the Federal Constitution is 'not an act of legislation within the proper sense of the word,' *Hawke vs. Smith*, No. 1 *supra* (253 U. S. 221), and while it was essential that the ratification be approved by a majority of a quorum of each branch of the General Assembly, in this case that requirement was met, and it was not until that approval had once been given, that the attempt which resulted in so much confusion was made to recall it." (Record, page 160.)

2. THE STATES CANNOT, BY CONSTITUTIONAL PROVISIONS,
LIMIT THE RIGHT OF THEIR LEGISLATURES TO
RATIFY AMENDMENTS TO THE CONSTITU-
TION OF THE UNITED STATES.

We shall not discuss in detail the provisions contained in the Constitutions of Missouri, Tennessee, West Virginia, Texas and Rhode Island, which, according to the contention of plaintiffs in error, limit the right of the legislatures of those states to ratify amendments to the Constitution of the United States. We submit that the provisions in the Constitutions of West Virginia, Texas and Rhode Island will not bear the construction which the plaintiffs in error have sought to place upon them. In our view, however, this question is relatively unimportant. For we submit that, in the ratification of an amendment to the Federal Constitution, legislatures cannot be controlled by the provisions of state constitutions.

If they could be controlled in this way—by such provisions, for instance, as those contained in the constitutions of Tennessee and Missouri—the ratification of amendments by legislatures could be effectively prevent-

ed. The Constitution of Tennessee attempts to say *when* the legislature shall ratify, and, if it may say this, it may say that the legislature shall *never* ratify. The Constitution of Missouri attempts to say that amendments of a *certain character* shall not be ratified, and, if it may say this, it may say that *no* amendments shall be ratified. It is easy to perceive that such provisions in the constitutions of 13 states would, in effect, amend the Constitution of the United States by preventing Congress from resorting to one of the modes of obtaining ratification of amendments prescribed in Article V of that instrument.

The decisions of this Court show that such provisions of state constitutions are invalid.

The second paragraph of Section 1 of Article II of the Federal Constitution contains the following language:

“Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress * * * ”

The effect of this provision was considered in *M'Pherson vs. Blacker*, 146 U. S., 1. The Court said (page 25):

“The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several states and the citizens of each State. What is forbidden or required to be done by a State is forbidden or required of the legislative power under State constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that ‘each State shall;’ and if the words ‘in such manner as the legislature thereof may direct’ had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of

those words, while *operating as a limitation upon the State in respect of any act up to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself." (Italics ours).

By Article V, the power of ratifying amendments is conferred upon the legislature, just as, by the language above quoted from Section 1 of Article II, the power of directing in what manner electors shall be appointed is conferred upon the legislature. In the one case, therefore, as in the other, the action of the legislature is free from any restraints which the constitution of the state may seek to impose.

In *Hawke vs. Smith*, 253 U. S. 221, this Court held that the State had no authority to require the submission of the ratification of a Federal amendment to a referendum under the State Constitution, and the Court said (page 230):

"It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

"This view of the amendment is confirmed in the history of its adoption found in 2 Watson on Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States."

The plaintiffs in error, on page 105 of their brief, concede that the case last cited decided that a State could not make "the legislature's ratification conditional on its being approved by popular vote." It seems scarcely

logical to contend that a State which cannot make the legislature's ratification of an amendment dependent upon a condition can unconditionally forbid that legislature to ratify the amendment at all.

The case of *Haire vs. Rice*, 204 U. S. 291, cited by plaintiffs in error, does not support their contention. That case did not deal with a constitutional amendment. There an Act of Congress authorized the people of the Territory of Montana to choose delegates to a convention charged with the duty of forming a Constitution and State Government, and in the same act granted certain lands to the State of Montana, which was about to be formed, and provided that these lands should be disposed of in such manner as the Legislature might prescribe. The question presented was whether the Legislature, in the disposition of the lands so granted, could be controlled by a provision of the State Constitution, and the Court, in deciding this question, having looked at all of the provisions of the Act in order to ascertain the intention of Congress, held that Congress, having used this language in the Act in which "the people of the territory about to become a State, were authorized to choose delegates to a convention charged with the duty of forming a Constitution and State Government," must have intended to confer the power to dispose of these lands upon the Legislature created by the Constitution and subject to the limitations therein imposed on that Legislature. The construction placed by the Court upon that Act of Congress can have no bearing upon the instant case, in which the Court is concerned with the construction to be placed upon Article V of the Constitution.

The plaintiffs in error, on page 111 of their brief, use the following language:

"The assent of a particular State must be the free and voluntary act of the people of that State, however much it must conform to the method Article V has fixed."

Let us assume, for the moment, the correctness of this proposition. Will the action of the Legislature of a particular State more truly represent the will of the people of that State who elected the members of that Legislature, if the Legislature is free of constitutional restrictions, or if it is bound by the provisions of a constitution which may have been adopted before the birth of any member of the Legislature or of any of the people who elected that Legislature?

The answer to the proposition above quoted is, however, that the people of the several States, when they adopted the Constitution, conferred upon the Legislatures of the several States the power to act upon Federal amendments, untrammelled by the provisions of any State Constitution then in force or which might thereafter be adopted.

III.

CONCLUSION.

We submit that the Nineteenth Amendment does not come within any implied limitations upon the amending power, for there are no such limitations; that it does not come within the express limitation upon that power; that its validity is upheld by the precedent of the Fifteenth Amendment and the decisions thereunder; that it has in fact been ratified by the Legislatures of more than 36 States; that those Legislatures were competent

to ratify it; and that, therefore, the decision of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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For Defendants in Error and Respondents.

(Appendix attached.)

APPENDIX A



APPENDIX A.

HISTORY OF THE FIFTH ARTICLE.

5 *Elliot's Debates.*

(p. 155):

“Tuesday, June 5.

“Gov. Livingston, of New Jersey, took his seat.

“*In Committee of the Whole.*

(p. 157):

“The thirteenth resolution, to the effect *that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the national legislature*, being taken up,—

“Mr. Pinckney doubted the propriety or necessity of it.

“Mr. Gerry favored it. The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the government. Nothing had yet happened in the states where this provision existed to prove its impropriety. The proposition was postponed for further consideration. * * *

(p. 178):

“Monday, June 11.

“Mr. Abraham Baldwin, from Georgia, took his seat.

“*In Committee of the Whole.*

(p. 182):

“The thirteenth resolution for amending the national Constitution, hereafter, without consent of the national legislature, being considered, several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.

“Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to change and violence. It would be improper to require the consent of the national legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

“Mr. Randolph enforced these arguments.

“The words ‘without requiring consent of the national legislature’ were postponed. The other provision in the clause passed, *nem. con.*”

(p. 530):

“Monday, September 10.

“*In Convention*.—

“Mr. Gerry moved to reconsider Article 19, viz:

“ ‘On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.’

“This Constitution, he said, is to be paramount to the state constitutions. It follows, hence, from this article, that two-thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether. He asked whether this was a situation proper to be run into.

“Mr. Hamilton seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to

the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice, than the people of a particular state. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The state legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

“Mr. Madison remarked on the vagueness of the terms, ‘call a convention for the purpose,’ as sufficient reason for reconsidering the article. How was a convention to be formed? By what rule decide? What the force of its acts?

“On the motion of Mr. Gerry, to reconsider,—

“Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; New Jersey, no, 1; New Hampshire, divided.

“Mr. Sherman moved to add to the article,—‘or the legislature may propose amendments to the several states for their approbation; but no amendments shall be binding until consented to by the several states.’

“Mr. Gerry seconded the motion.

“Mr. Wilson moved to insert ‘two-thirds of’ before the words ‘several states’; on which amendment to the motion of Mr. Sherman,—

“New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, ay, 5; Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, Georgia, no, 6.

“Mr. Wilson then moved to insert ‘three-fourths of’ before ‘the several states’; which was agreed to, *nem. con.*

“Mr. Madison moved to postpone the consideration of the amended proposition, in order to take up the following:

“‘The legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States.’

“Mr. Hamilton seconded the motion.

“Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the states not interested in that property and prejudiced against it. In order to obviate this objection, these words were added to the proposition:

“‘provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article.’

"The postponement being agreed to,—

"On the question on the proposition of Mr. Madison and Mr. Hamilton, as amended,—

"Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; Delaware, no, 1; New Hampshire, divided."

(p. 546):

"Saturday, September 15.

"In Convention,—

(p. 551): "Art. 5.

"The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose, amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of Article 1."

"Mr. Sherman expressed his fears that three-fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the states importing slaves should be extended, so as to provide that no state should be affected in its internal police, or deprived of its equality in the Senate.

"Col. Mason thought the plan of amending the constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

"Mr. Gouverneur Morris and Mr. Gerry moved to amend the article, so as to require a convention on application of two-thirds of the states.

"Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the states, as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided.

"The motion of Gouverneur Morris and Mr. Gerry was agreed to, *nem. con.*

"Mr. Sherman moved to strike out of Article 5, after 'legislatures,' the words 'of three-fourths,' and so after the word 'conventions,' leaving future conventions to act in this matter, like the present convention, according to circumstances.

"On this motion,—

"Massachusetts, Connecticut, New Jersey, ay, 3; Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 7; New Hampshire, divided.

"Mr. Gerry moved to strike out the words, 'or by conventions in three-fourths thereof.' On which motion,—

"Connecticut, ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 10.

"Mr. Sherman moved, according to his idea above expressed, to annex to the end of the article a further proviso,—‘that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the senate.’

"Mr. Madison: Begin with these special provisos, and every state will insist on them, for their boundaries, exports, etc.

"On the motion of Mr. Sherman,—

"Connecticut, New Jersey, Delaware, ay, 3; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8.

"Mr. Sherman then moved to strike out Article V altogether.

"Mr. Brearly seconded the motion; on which,—

"Connecticut, New Jersey, ay, 2; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8; Delaware, divided.

"Mr. Gouverneur Morris moved to annex a further proviso,—

"‘that no state, without its consent, shall be deprived of its equal suffrage in the Senate.’

"This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or, on the question, saying no."



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In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,

versus

J. MERCER GARNETT, ET AL.,
DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND.

CONDENSED BRIEF FOR PLAINTIFFS
IN ERROR.

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INDEX.

	PAGE
STATEMENT OF THE CASE.....	2-4
PROPOSITIONS.....	4-6
ARGUMENT.....	6
PROPOSITION I.....	6-28
Power to Amend is Delegated.....	8
Must Be Construed So as to Subserve Purpose of Constitution.....	9
Purpose of Constitution,—An Indestructible Union of Indestructible States.....	10-13
Independent Existence of States Includes Independ- ence in Determining Electorate.....	13-14
Body Politic Changed by Suffrage Amendment.....	14-15
Private Citizens Alone Represent Old State.....	15-16
Legislature of Old State Expressed Its Will.....	17-18
Attorney-General Cannot Speak For It.....	19
Power to Change Electorate is Power to Destroy State.....	19-25
Power to Tax is Power to Destroy.....	20-23
Limit on Each Power from "Necessary Implication".....	24-27
Express Limits Do Not Exclude Implied Limits.....	25-27
No Power to Destroy States.....	28
PROPOSITION II—	
Prohibition Amendment Does Not Change or Destroy State Governments.....	28-30
Control of Liquor Not a "Function Essential to Sep- arate Existence".....	30-31
PROPOSITION III—	
Equal Suffrage in Senate.....	31
History and Meaning.....	32
Nineteenth Amendment Deprives State of Suffrage in Senate.....	33
PROPOSITION IV—	
Power to Consent Cannot Be Impaired.....	33-34

Vermont Illustrates Its Impairment.....	34
Reservation of Power to Consent Means Reservation of Control of Suffrage.....	35
Alexander Hamilton Denounces National Control of Suffrage as a "Violation of Principle".....	36
Power to Consent Includes Means of Consenting....	36
PROPOSITION V—	
Fifteenth Amendment Consented To.....	36-41
Ratification Thereof Analogous to a Treaty of Peace	38
Treaty-making Power Expands in War.....	39
Consent of Non-seceding States Presumable from Universal Acquiescence.....	40-41
PROPOSITION VI—	
Tennessee Did Not Ratify.....	42-43
West Virginia Did Not Ratify.....	43-44
Missouri Legislature Forbidden to Ratify.....	44
No Conflict Between Article V and Missouri Consti- tution.....	45
No Duty to Ratify Imposed.....	46
Tennessee Legislature Forbidden to Ratify Until Election Intervenes.....	47
Purpose of this Safeguard.....	48
Necessity for Such Provision.....	48-49
Disgraceful Haste of Other Legislatures.....	49
West Virginia, Texas and Rhode Island—Similar Provisions.....	50
CONCLUSION—	
Centralization Probable as Result of Prohibition Cases.....	50-51
Irrepealable Laws a Coming Menace.....	51
"Independent Autonomy" of States the Only Pro- tection.....	51
Power to Refuse Consent Must Be Preserved.....	51

TABLE OF CASES.

Brown vs. Maryland, 12 Wheat. 419.....	19
Collector vs. Day, 11 Wall. 113.....	21, 22, 23, 26, 27
Dodge vs. Woolsey, 18 How. 348.....	9
Evans vs. Gore, 253 U. S. 245.....	27
Geofroy vs. Riggs, 133 U. S. 258.....	39
Hawke vs. Smith, 253 U. S. 221.....	8
Keller vs. United States, 213 U. S. 138.....	19
Lane County vs. Oregon, 7 Wall. 71.....	11
Legal Tender Cases, 12 Wall. 457.....	9
Marbury vs. Madison, 1 Cranch 137.....	52
McCulloch vs. Maryland, 4 Wheat. 316.....	22
Myers vs. Anderson, 238 U. S. 368.....	36, 39
National Prohibition Cases, 253 U. S. 350.....	28, 30
Pollock vs. Farmers' L. & T. Co., 157 U. S. 429.....	27
Rhode Island vs. Palmer, 253 U. S. 350.....	28, 30
Slaughter-House Cases, 16 Wall. 36.....	25, 26, 38
Texas vs. White, 7 Wall. 700.....	11, 12, 13
United States vs. Railroad Co., 17 Wall. 322.....	27
White vs. Hart, 13 Wall. 646.....	13
Yerger, Ex Parte, 8 Wall. 85.....	10

CONSTITUTIONS AND STATUTES.

UNITED STATES CONSTITUTION—

Article I.....	20, 26, 46
Article V.....	7, 31, 33, 35, 45, 46, 48, 49
Amendments, Article X.....	50
" Article XIII.....	38
" Article XIV.....	38
" Article XV.....	36, 38, 40, 41
" Article XVI.....	27
" Article XVII.....	32
" Article XVIII.....	28, 30
Rev. Stat., Sec. 205.....	43

MISSOURI CONSTITUTION—

Article II, Sec. 3.....	44
-------------------------	----

TENNESSEE CONSTITUTION—

Article II, Sec. 32.....	47
--------------------------	----

TEXAS, RHODE ISLAND AND WEST VIRGINIA CONSTITUTIONS

44, 50

OTHER QUOTATIONS.

Hamilton, Alexander (in 59th Federalist).....	36
Judson, Frederick N. (in "The Judiciary and The People")	15
King, Alexander C. (in Brief).....	30
Lincoln, Abraham (in first inaugural).....	10
Madison, James—	
(In 43rd Federalist)	32, 33
(Virginia Plan).....	32
Maryland Resolutions Rejecting Nineteenth Amendment....	17

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CONDENSED BRIEF FOR PLAINTIFFS
IN ERROR.

In the original brief submitted by counsel for the Plaintiffs in Error it was found necessary to go into a number of matters, many of them of an historical character, in considerable detail.

It was thought that this ought to be done for the reason that this Court would naturally not care to adjudicate such a question as is involved in this case, viz: the question of whether or not there is any limit to the power to adopt amendments or make changes in

our governmental system, delegated to certain agents, to wit: two-thirds of a quorum of the two Houses of Congress and a majority of a quorum of thirty-six State Legislatures, by the people of the several States in Article V of the Federal Constitution, without having before it the fullest information.

The result has been, however, to make that brief so long that we have felt it might be an aid to the Court to have the main questions involved in this cause presented in a separate brief in a somewhat more condensed form, and the following is therefore respectfully submitted:

STATEMENT OF THE CASE.

This case comes to this Court upon a writ of error to the Court of Appeals of Maryland, (and also upon petition for writ of certiorari) to review a judgment of that Court affirming a judgment of the Court of Common Pleas of Baltimore City, wherein the latter Court denied the petition of Plaintiffs in Error, citizens and voters of the State of Maryland, constituting the organization known as the "Maryland League for State Defense," for an order commanding the Defendants in Error, constituting the Board of Registry of a certain precinct, to strike from the list of qualified voters the names of two women who had been registered by said Board over the protest of one of the petitioners.

The original proceeding was taken by the Petitioners in pursuance of the authority so to do given by the Maryland Statutes, and the Court of Appeals of Maryland held that the Court below had full jurisdiction in the premises.

The Defendants in Error, the Board of Registry, claimed the right to register these women by virtue of the authority conferred upon them as officers of registration of the State of Maryland by the alleged Nineteenth Amendment to the Constitution of the United States.

The Plaintiffs in Error, on the other hand, claimed that said alleged Nineteenth Amendment was repugnant to the Constitution and especially to the proviso of Article V thereof, forbidding the adoption of any amendment whereby the State of Maryland, *as that State was constituted prior to the proclaiming of said amendment*, was deprived without its consent of its suffrage in the Senate. They also claimed the right not to have their right to vote diminished in value,—half taken away by an amendment like the Nineteenth,—on the ground that such an amendment was forbidden by Article V of the Constitution.

The Court of Common Pleas denied these contentions of the Plaintiffs in Error, holding that the power to adopt amendments to the Constitution delegated to Congress and the said State Legislatures was practically without limit, saying, "This Court is of opinion that the power of amendment of the Federal Constitution is substantially unlimited" (Record, p. 21).

The Court of Appeals of Maryland in affirming the judgment of the Court of Common Pleas held that by reason of the similarity of the Nineteenth Amendment to the Fifteenth, the decisions of this Court in which it had recognized the Fifteenth Amendment as being validly a part of the Constitution constituted a prece-

dent binding upon the Court of Appeals which precluded it from considering the argument that the Nineteenth Amendment was beyond the scope of the amending power conferred in Article V, or forbidden by Article V, and therefore expressed no opinion regarding the validity of those arguments further than to say that if the question were an open one it would feel bound to recognize their force (Record, p. 156).

The Plaintiffs in Error made the further contention that, assuming that the Nineteenth Amendment was not beyond the scope of the amending power, it has never been legally ratified by the requisite number of the State Legislatures, that is to say, by the Legislatures of thirty-six of the States. This contention was also denied by the Board of Registry and the Court of Common Pleas, and the judgment of the Court below in that respect was affirmed by the Court of Appeals.

Upon this state of the case we submit the following propositions:

PROPOSITION I.

The so-called 19th Amendment is totally void because the adoption of such an amendment is not within the scope of the power to adopt amendments to the Federal Constitution which was DELEGATED by the people in adopting that Constitution (in Article V thereof) to Congress and the Legislatures of three-fourths of the States, for the reason that the power to adopt such an amendment as this would mean the power to add to or subtract from the electorate of a State without the consent of its people to such an extent as to totally destroy the State—the autonomy of the State as a political body “possessing all the functions essential to a separate and independent existence”—thus defeating the very purpose which the people had in adopting the Constitution,

which was to establish a perpetual union of "such States"—an indestructible union of indestructible States.

PROPOSITION II.

The decision of this Court in the case of *Rhode Island vs. Palmer*, wherein it was held that the 18th or Prohibition Amendment was within the scope of the amending power granted in Article V constitutes no precedent for holding valid the 19th Amendment. The 18th Amendment did not attack or interfere with the GOVERNMENT of the State—"the structure of the State Government"—or deprive it of any function "ESSENTIAL TO ITS SEPARATE AND INDEPENDENT EXISTENCE."

PROPOSITION III.

The adoption of such an amendment as the 19th is forbidden by the EXPRESS limitation contained in Article V, viz.: That "no State WITHOUT ITS CONSENT shall be deprived of its equal SUFFRAGE in the Senate"; in that the State of Maryland, as that State was constituted prior to the submission of this amendment, is deprived altogether of its suffrage in the Senate and will be represented hereafter in the Senate by persons not of its own choosing, i. e., by Senators chosen by voters whom the State itself has not authorized to vote for Senators.

PROPOSITION IV.

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it MAY be deprived of its equal suffrage in the Senate; and, second, THAT IT MAY NOT BY ANY AMENDMENT BE DEPRIVED OF ITS POWER TO GIVE OR REFUSE ITS CONSENT.

PROPOSITION V.

The various cases decided by this Court since the Civil War, including the case of *Myers vs. Anderson*, 238 U. S.

368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this Court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the States—has been, in fact, consented to, however reluctantly, by each and all of them, is valid and had to be accepted by this Court as being valid when the question of its validity was raised for the first time in *Myers vs. Anderson*, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

PROPOSITION VI.

The Nineteenth Amendment has never been legally ratified by the requisite number of States, even assuming that the State Legislatures are competent to ratify an amendment like the Nineteenth, which radically changes, and, in fact, nullifies so vital a part of their State Constitution as that which limits the right of suffrage to men, by conferring it upon women. Neither Tennessee nor West Virginia ever ratified at all.

ARGUMENT.

PROPOSITION I.

The so-called 19th Amendment is totally void because the adoption of such an amendment is not within the scope of the power to adopt amendments to the Federal Constitution which was DELEGATED by the people in adopting that Constitution (in Article V thereof) to Congress and the Legislatures of three-fourths of the States, for the reason that the power to adopt such an amendment as this would mean the power to add to or subtract from the electorate of a State without the consent of its people to such an extent as to totally destroy the State—the autonomy of the State as a

political body "possessing all the functions essential to a separate and independent existence"—thus defeating the very purpose which the people had in adopting the Constitution, which was to establish a perpetual union of "such States"—an indestructible union of indestructible States.

The only power to adopt amendments to the Federal Constitution which Congress and the Legislatures of three-fourths of the States have is that which was conferred upon these agents by the people of the respective States when they adopted Article V of the original Constitution.

"ARTICLE V: The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for *proposing* Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, *when* ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State *without its Consent*, shall be deprived of its equal *Suffrage* in the Senate."

The original Constitution, including this Article, was adopted by the *people* of the several States through Conventions elected by them in each State, and no question is made here as to the right of the people in the same way to adopt an amendment of this kind or

any other amendment they might see fit to adopt. Or to abolish the Federal Government altogether, repeal the Constitution and thus put an end to the Union. Or, for that matter, to abolish all the State Governments and confer all political power upon a central authority. Because the people of the several States in Conventions assembled,—the people of each State joining with the people of all the other States,—are legally omnipotent like the British Parliament. In them,—and in them alone,—resides the ultimate sovereignty,—the power which acknowledges no limit except its own will.

But the question here is whether this sovereign people, or to be more accurate, these sovereign peoples of the several States, did or did not *delegate* to their agents named in Article V, to wit: Congress and the Legislatures of three-fourths of the several States, the power to adopt such an "amendment" as this.

That the power to amend the Constitution contained in Article V is a *delegated* power is not open to question:

"The Fifth Article is a *grant of authority by the people to Congress*. The determination of the method of ratification is the exercise of a national power *specifically granted by the Constitution*. That power is *conferred upon Congress* and is *limited* to two methods of action, by the Legislatures of three-fourths of the States, or by conventions in a like number of States."

Hawke vs. Smith, 253 U. S. 221, 227.

The power to adopt amendments under Article V is a "delegated" power.

Dodge vs. Woolsey, 18 How. p. 348.

The only question is whether or not the power to adopt amendments thus delegated goes to the extent of authorizing the adoption of such an amendment as the Nineteenth.

The answer to that question, of course, depends upon the construction which this Court shall place upon the language employed in Article V. This Article grants the power to "amend" in *general* terms. All we need ask the Court to do in this case is to apply the same rule of interpretation to this grant of power which it has always applied to the construction of powers granted by the people to other agencies of government in the Constitution, and that rule is, as we will soon see, merely the rule universally applicable to the construction of all written instruments.

It has been stated by this Court as follows:

"Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the *objects* for which those powers were granted. *This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions.* If the *general purpose* of the instrument is ascertained, the language of its provisions must be construed with reference to *that purpose* and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered." (*Italics ours.*)

Legal Tender Cases, 12 Wall. 457, at p. 531.

"The great and leading intent of the Constitution must be kept constantly in view upon the examination of every question of construction."

Ex parte Yerger, 8 Wall. 85, at p. 101.

What then was the "general purpose"? What "the great and leading intent" of the people in adopting the Federal Constitution? That it was their intention to establish a Union of the several States under a Federal Government is of course patent. Whether they intended that that Union should be perpetual or that any number of its members less than the whole would be authorized *by the Constitution itself* to put an end to the Union was a question which was at one time subject of high debate in this country. We had supposed that that debate had ended at Appomattox, and that the question had been finally put at rest by the decisions of this Court which followed.

The view of this question finally adopted and expounded by this Court was clearly foreshadowed by Mr. Lincoln in his first inaugural address:

"I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. *Perpetuity is implied if not expressed* in the fundamental law of all national governments. It is safe to say that no government ever had a provision in its organic law *for its own termination*. Continue to execute all the express provisions of our National Government and the Union will endure forever,—it being impossible to destroy it *except by some action not provided for in the instrument itself.*"

And again:

"But if destruction of the Union by one or a *part only of the States* be lawfully possible, the Union is less perfect than before, the Constitution having lost the vital element of perpetuity."

And accordingly in a series of decisions rendered soon after the Civil War, this Court established the doctrine thus propounded by Mr. Lincoln, that the Union was intended to be a perpetual Union,—“an indestructible Union of indestructible States,” and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that “great and leading intent” of the people, by destroying any one or more of the States by taking away in whole or in part any one of the “*functions essential to their separate and independent existence*” as States.

In the cases of *Lane County vs. Oregon*, 7 Wall. 71, and *Texas vs. White*, 7 Wall. 700, this great principle of constitutional interpretation is expounded in language which cannot be misunderstood, and it is there held that it was the intention of the people in adopting the Constitution not only to establish a perpetual Union of States, but more specifically of States, each one of which should be immune from any interference with or even “*crippling*” of any of the functions essential to its separate and independent existence as a State.

“And we have already had occasion to remark at this term, that ‘the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,’ and that ‘without the

States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and *independent autonomy* to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, *in all its provisions*, looks to an *indestructible Union composed of indestructible States.*" (*Italics ours.*)

Texas vs. White, 7 Wall. 700, at pp. 724-25.

Now, obviously Article V, which is one of the "provisions" of this Constitution, must be so construed as not to defeat the main purpose of the Constitution itself. But if, under that Article, an "amendment" like the Nineteenth may be adopted which takes away from the people of the State of Maryland or any other State, without its *consent*, the right to say who shall vote at its own State elections, and compels the people of that State to permit an equal or greater number of *other* people to participate in its State elections (or in the selection of its Senators), what becomes of the "independent autonomy" of the State? How can such a construction be put upon this Article unless this Court is prepared to retract what it said in Texas vs. White, viz: "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, etc."?

Again this Court has said in the same opinion:

"A State, in the ordinary sense of the Constitution, is a *political* community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of *such* States, under a common Constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, etc." (*Italics ours.*)

Texas vs. White, 7 Wall. 721.

In other words, it was the intention of the people who adopted the Constitution to establish a perpetual Union of States, each one of which should have a government established with the consent of the governed, that is, their own government constituted of officials of their own selection and possessing "all the functions essential to separate and independent existence."

"The National Constitution * * * assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, *it intended to make them so.*"

White vs. Hart, 13 Wall. 646, 650.

How is this intention on the part of the people reconciled with the intention at the same time to authorize amendments to be adopted to this Constitution by some States which would regulate the electorate of non-consenting States? No sane man can deny that the right to determine for itself who shall vote at its own State elections, who shall select the persons who are to exercise the powers of government in the State,—is one of

"the functions essential to separate and independent existence." How can a State be said to have a "separate and *independent* existence" if *other* States have the constitutional right and power, by ratifying an amendment to the Federal Constitution, or by any other methods, to force upon the people of that State an electorate different from that which those people themselves have created in their State Constitutions? It must be obvious that in that case the continued existence depends upon the will of Congress and these other States.

What is a "State" within the meaning of the Constitution? It is certainly not merely a piece of territory. It is certainly not a mere collection of people. It is, as this Court has said in the case above cited, "a *political* community." Who *constitute* the State in that sense? Clearly the people who exercise the *political* power. That is to say, the *electorate* and those whom the electors of a State choose to clothe with the governmental power of the State. *They* constitute the State. *They are* the State. So for all political purposes,—all such purposes as we are now considering,—there may be numerous persons residing in a State who constitute no part of this *body politic*, because they have no share in the exercise of any of the functions of the government,—not being a part of the electorate until admitted by that electorate to share in the suffrage.

When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created. That is exactly the *de facto* effect of this Suffrage Amendment. The State of Maryland as that State was constituted prior to the

proclamation of this amendment, no longer exists. It is no longer the same political community. *Its public officials are not responsible to the same constituency.* Of course, after an amendment to the Federal Constitution has been officially proclaimed by the Federal authorities as having been lawfully adopted, all State *officials* are compelled to obey it, and recognize it as being validly a part of the Constitution and binding upon them until such time as this Court shall declare it void.

"This judicial power as recognized in the United States must therefore remain dormant and legislative acts must be obeyed; any one, as a public official refuses obedience at his peril until some one's individual case is brought before the Court for judgment and decided."

The Judiciary and The People, by Frederick N. Judson, p. 106.

Hence it is that all the State officials being under the dominion of this newly created "political community" are no longer in a position to represent or speak for the original State of Maryland,—not even the Attorney-General. And hence it is that individual citizens of that State, the Petitioners and Plaintiffs in Error in this case, organized under the name of the Maryland League for State Defense, have been compelled to institute these proceedings to vindicate the right to continued existence of the original State of Maryland.

The situation of the State of Maryland in this matter would seem to be not unlike that of a corporation which has a cause of action against persons claiming

to have rights in conflict with the charter rights of its stockholders.

Ordinarily the board of directors and officers of the corporation are the proper persons to institute proceedings necessary to enforce that cause of action,—the rights of the corporation. But when it appears that the parties against whom the cause of action is to be enforced have secured control of the board of directors of the corporation by virtue of having the ownership or control of a majority of its capital stock, or by any other means, then the individual stockholders of the corporation may vindicate the rights of the corporation by proceeding in their own names in its behalf.

It is to be noted that the Honorable Alexander Armstrong appears as counsel for the Board of Registry, the Defendants in this case, but the Court will not make the mistake of supposing that in doing so he has any authority to speak for the State of Maryland.

The only official authority which he can claim to have for appearing for that Board of Registry is found in the laws of Maryland enacted long before the Nineteenth Amendment was ever proposed, making it part of the official duty of the Attorney-General to defend suits instituted against the Boards of Registry. This law was, of course, enacted in recognition of the hardships which would ensue if a citizen could be compelled to serve as a member of a public board and also compelled to employ private counsel to defend his official acts.

So far from having any authority from the *State of Maryland* to represent *it* in making the contentions which are being made on behalf of the Defendants in the effort to establish the validity of the Nineteenth Amendment, whereby that State is forced to admit to the right of suffrage a class of voters which it was unwilling to have vote at its elections, the fact is, that the Legislature of Maryland, to which body the question of approving or rejecting the amendment submitted by Congress had been referred, adopted resolutions in which they not only refused to ratify the amendment, but refused in the most emphatic terms, and in the resolutions of rejection make the following declarations:

"It is manifest, therefore, that when the people, in this same Federal Constitution, conferred upon Congress and the Legislatures of three-fourths of the States the power to 'amend' that Constitution, it could not have been their intention to authorize the adoption of any amendment or any measure under the guise of an amendment, which would wholly or partially destroy the States, by taking away from the States any one of their functions essential to their separate and independent existence as States.

"The right of a State to determine for itself by the vote of its own people, who shall vote at its own state, county and municipal elections is one of those functions.

* * * * *

"Resolved Further, That the General Assembly of Maryland could not exercise the power to ratify this so-called Nineteenth Amendment, conferred upon it, or supposed to be conferred upon it, by the Fifth Article of the Constitution of the United

States, without violating, in most flagrant fashion, the Constitution of our own State.

* * * * *

"We conceive that the members of this General Assembly would be false to their duty to their own people, if not to their official oaths, if they should vote to ratify the proposed amendment." (Record, p. 9).

It is true that after the proclaiming by the Secretary of State of the amendment as having become a part of the Constitution of the United States, the Legislature of Maryland, in a special session, recognizing that until such time as the amendment should be declared void by this Court it must be obeyed by all persons in official position at their peril, and that for that reason the officers of registry and officers of elections would have to register all the women who should apply for registration, and that the officers of elections would have to permit all registered women to vote, passed an act providing facilities in the shape of increased number of election precincts and registration and election officers to enable the voting to be done in a proper and orderly manner.

But it is to be noted that at the *same session* that Legislature, notwithstanding the tremendous pressure put upon it by the advocates of the amendment, rejected the resolution to rescind their previous action by the same majority by which it had rejected the amendment, and left the resolution which it had adopted, from which we have just above quoted, still in full force and effect.

Therefore, of course, while Mr. Armstrong may have a perfect right to represent the Board of Registry, we assume, of course, that he will not assume the right to speak for the State of Maryland in this cause.

But even if it could be thought that the effect of *this* amendment is not what we claim it to be, viz: To destroy the original political body known as the State of Maryland and substitute a new State under the same name, thereby destroying the old "indestructible" State and making a new one, nevertheless, it cannot be denied that if the power to adopt amendments *changing the electorate* at all exists, it is impossible to draw the line at any point short of a change which *will*, manifestly, destroy the State, as for instance, amendments which abolish the present electorate altogether and confer the right to elect State officials upon other persons, or some one other person.

"Questions of power do not depend upon the degree to which they may be exercised in the particular case."

Opinion of Chief Justice MARSHALL in
Brown vs. Maryland, 12 Wheaton
419, 439.

The test of the validity of a power is not how it is *probable* that it may be exercised in particular cases, but *what can be done under it*.

Keller vs. United States, 213 U. S. 138, 148.

What is it that may not be done under this power to change the electorate of the State without the consent of that electorate,—if the power exists at all under

Article V? If this Court were to hold the Nineteenth Amendment valid it could not hold invalid a subsequent amendment, which, instead of taking away *half* of the voting power of the men qualified to vote under the Constitution of the State, as this amendment does, should take away *all* of that power and make the State a body politic composed of women alone, without acting in an arbitrary manner and in total disregard of the established doctrine of *stare decisis*,—a doctrine without the recognition of which, at any rate in a reasonable degree, we have no such thing as a government of law as distinguished from a government of men,—a personal and arbitrary government.

And we know that this Court has always given careful regard to this principle in construing similar grants of power contained in the Constitution.

The language in which the power to adopt amendments is granted to Congress and the State Legislatures in Article V of the Constitution is certainly no broader than that in which the power to levy and collect taxes is granted to Congress in Section 8 of Article I, which provides as follows:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”

In the same Article there is an express provision:

“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”

And:

“No Tax or Duty shall be laid on Articles exported from any State.”

In other words, three express limitations on the taxing power granted. Yet this Court held, in the case of *Collector vs. Day*, 11 Wall. 113, that it would not construe this language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a State Judge, for the same reason that we contend that similar language in Article V should not be construed to authorize Congress and the State Legislatures to adopt an amendment changing the electorate or any part of the governmental structure of a State. In that case the question was whether this power to “lay and collect taxes, duties, etc., to pay the debts and provide for the common defence and general welfare of the United States,” conferred on Congress by the section above quoted authorized the laying of a tax, however small, upon the salary of a State official,—in this case a State judge.

Notwithstanding the broad and general terms in which this taxing power had been conferred, it was held that it did not, the ground of the decision being that the right and power to establish and maintain a judiciary was necessary to the existence of a State, that is, such a State as is contemplated by the Constitution; that if any authority outside of the State, such as Congress or the Legislatures of other States, had the power to tax the salaries of judges, it might tax the judiciary out of existence, and thus *destroy* the State, and that, inasmuch as the people in adopting the Con-

stitution intended to establish a union of *indestructible* States, they could not have intended *even by the broad and general language of this Article* to authorize Congress to levy such a tax. In its opinion the Court says:

"The cases of *McCulloch vs. Maryland*, and *Weston vs. Charleston*, were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch vs. Maryland*. 'If the States,' he observes, 'may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government.' 'This,' he observes, 'was not intended by the American people. They did not design to make their Government dependent on the States.' (And it must be equally true that the American people did not design to make any of the States dependent for their existence as republics—as States with a republican form of government—upon the will of any particular number of States.)

"Again, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' * * * 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. * * *'

"* * * Upon looking into the Constitution it will be found that but a few of the Articles in that instrument could be carried into practical effect without the existence of the States.

" * * * The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be *crippled*, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

* * * Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might.

" * * * *It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?*" (Italics ours.)

This case would seem to be conclusive of the question before us. For if the power to maintain a judiciary whose salaries shall be exempt from taxation by the Federal Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission, or the ratification by State Legislatures of an amendment whereby the States shall be forced to admit to the elective franchise in their State elections an equal or greater number of other people whom they are not willing to have vote, but even if there were no such provision, as said in *Collector vs. Day*, their exemption from such an amendment "rests upon *necessary implication*, and is upheld by the great law of self-preservation," as any government the persons who elect which can be selected and determined by another and distinct government can exist only "at the mercy" of that government, that is, is not "indestructible."

The right of a people to select the persons who are to make and to administer their laws is what constitutes them a "political community of free citizens" and entitles them to be called a State. For (to paraphrase again the language of *Collector vs. Day*), of what avail is the right to elect their own State officers, if another power outside the State, that is, Congress and the Legislatures of other States, may take that right away at its discretion?

If this "other power" has the right to say that women shall vote at State elections in States like Virginia and Maryland, which have rejected this Suffrage Amendment, it would have equally the right to say that *men* shall *not* vote in those States or that only *certain* men or certain women shall vote. What, then, becomes of those States? Can they be said to be indestructible States if their continued existence is thus "at the mercy" of another? Or could such a State be said to be still "a political community of free citizens with a government established by the consent of the governed"?

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects.

It might be a sufficient answer to that contention to say that the maxim "*expressio unius exclusio alterius*," while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the Courts would certainly look to the consequences which might follow such an interpretation of Article V, as we have endeavored to point out those consequences or some of them in this argument, and, viewing those consequences, would be governed by the principle so forcibly stated by Mr. Justice MILLER in his great opinion in the Slaughter-House cases, as follows:

16 Wall. 36, 78.

"The argument we admit is not always the most conclusive which is drawn from the consequences

urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt.*" (Italics ours.)

Surely it cannot be said that Article V confers upon Congress and the State Legislatures, or three-fourths of them, the power thus to destroy the "indestructible Union of indestructible States" in language which expresses such a purpose "too clearly to admit of doubt."

But perhaps a more conclusive answer to this contention will be found in the fact that the Supreme Court turned down the same argument when made for a like construction of the Taxing Clause of the Constitution, in *Collector vs. Day* (*supra*).

For it will be remembered that while Section 8 of Article I confers upon Congress the "power to lay and collect taxes" in general terms, there are several other *express* exceptions or limitations on this taxing power contained in this Article; such as the provisions that

"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration," etc., and that "No tax or duty shall be laid on articles exported from any State." Nevertheless the general power "to lay and collect taxes," as we have already seen, was held not to include the power to lay a tax on the salary of a State judge.

The rule of construction announced in *Collector vs. Day* has been reaffirmed by this Court in the recent case of *Evans vs. Gore*, 253 U. S. 245, involving the construction of the Sixteenth Amendment, which provides for the taxing of incomes "from whatever source derived,"—language even broader and more explicit than that of either the taxing clause or the amending clause. In that case the Court said:

"True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector vs. Day*, 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a State Court; in *Pollock vs. Farmers Loan and Trust Co.*, 157 U. S. 429, 585, 601, 652, 653, it was held—the full Court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in *United States vs. Railroad Co.*, 17 Wall. 322, there was a like holding as to municipal revenues derived by the City of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none, but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres."

No power granted by the Constitution, in whatever language, has heretofore been held sufficient, directly or indirectly, to destroy the States without whose existence we would "disappear from among the family of nations."

PROPOSITION II.

The decision of this Court in the case of *Rhode Island vs. Palmer*, wherein it was held that the 18th or Prohibition Amendment was within the scope of the amending power granted in Article V constitutes no precedent for holding valid the 19th Amendment. The 18th Amendment did not attack or interfere with the GOVERNMENT of the State—"the structure of the State Government"—or deprive it of any function "ESSENTIAL TO ITS SEPARATE AND INDEPENDENT EXISTENCE."

It is true that the so-called Prohibition or 18th Amendment marked a new stage in the development of American constitutional government, and that it transferred from the exclusive domain of State legislation to the domain of national legislation the right to make laws regulating the manufacture and sale of intoxicating liquors, thereby diminishing to that extent the legislative power of the State and enlarging the grant of legislative power to the Federal Government. As to the wisdom of such an amendment a violent controversy is now raging and may continue to rage for a long time to come.

But with that controversy we have no concern in this case.

Many arguments were made against the validity of that 18th Amendment.

But the argument which is made here against the validity of the 19th Amendment could not be made against the 18th.

That amendment did not in the slightest degree affect the independent existence of the State.

It did not undertake to interfere in any way with the governmental structure of the State. It did not undertake in any way to interfere with the right of the people of each State to determine by their own votes who should elect their own government officials; who should *govern the State*. In other words, it did not undertake to interfere, as this 19th Amendment does, in any way with the *electorate*.

It confined itself to doing the same kind of thing which had been done in the original Constitution,—that is, transferring from the States to the Federal Government a certain subject of legislation which it was thought could be better dealt with by the Federal Government than the State governments. The original Constitution took away from the States with their consent, it is true, the power to make laws on a good many subjects which had previously been within their exclusive jurisdiction, such as the right to make treaties, to levy taxes on imports and exports, etc.

It had a good deal to say as to what a State might do or not do, but it had not a word to say as to what a State should *be*, what persons in the State should exercise the functions or discharge the powers of government—in other words, who should *constitute* the State, except that a republican form of government was

guaranteed to each State, and a guarantee of a republican form of government is simply a guarantee of a right to self-government, the right of the people in a State already in existence and legally constituted to determine for themselves who shall govern them and by what methods. It must have been clearly recognized in that case that the 18th Amendment was obnoxious to no such objection; and, indeed, it was upon that ground that its validity was sought to be maintained by the counsel for the United States, as would appear from the following extract from the brief filed by the Honorable Alexander C. King, Solicitor General:

"It is idle in this case to suggest that this power of amendment might be used *to change the form of the Government*. This amendment suggests no such thing. It simply transfers a power exercised by the State governments to be exercised by the Federal Government. It leaves the *structure* of the State governments and their general purposes and those of the Federal Government unaltered."

Brief of Defendants in support of motion
to dismiss in case of Rhode Island vs.
A. Mitchell Palmer, Attorney General,
pages 44-45.

Whatever other objections there might have been to the validity of the 18th Amendment, it could not be said that it in any way tended to deprive any State of any of "the functions essential to its separate and independent existence" as a State. Certainly, the power to regulate the liquor business, however important, cannot be said to be one of those functions essential to the separate and independent existence of a State.

But no man will deny that the right of a State to determine for itself who shall vote at its own elections, who shall exercise either directly or through duly elected officials all the powers of government—in other words, who shall *constitute* the State—is one of the functions essential to its independent existence as a State.

PROPOSITION III.

The adoption of such an amendment as the 19th is forbidden by the EXPRESS limitation contained in Article V, viz.: That "no State WITHOUT ITS CONSENT shall be deprived of its equal SUFFRAGE in the Senate"; in that the State of Maryland, as that State was constituted prior to the submission of this amendment, is deprived altogether of its suffrage in the Senate and will be represented hereafter in the Senate by persons not of its own choosing, i. e., by Senators chosen by voters whom the State itself has not authorized to vote for Senators.

This is from many points of view the most important provision in the Constitution of the United States. It is the clause which was the result of the longest and fiercest controversy between the representatives of the large States and the small States in the Convention which adopted the Constitution.

The history of the controversy which resulted in the engrafting upon Article V of this guarantee to the States in perpetuity of equal suffrage in the Senate will be found set forth at length in our original brief, beginning at page 49, under the head of "Express Limits of the Amending Power, (a) History of the Proviso."

Without a knowledge and present keeping in mind of that history it is impossible to realize the full meaning, purport and effect of that clause.

It is well described by Mr. Madison in No. 43 of the *Federalist*, page 204, as "*a palladium to the residuary sovereignty of the States*" and it is manifest from the history of the debates and discussions preserved by Curtis in his "*History of the Constitution*," and in Elliott's Debates, as quoted in our brief, that if the larger States had not ultimately yielded their assent to the adoption of this principle the convention would have adjourned without adopting any Constitution at all. A study of this history is particularly necessary in order to enable us to understand what was meant by the word "suffrage" as used in this clause.

It appears that at an early stage of the controversy the larger States, like Virginia (which owned all the territory covered at present by Kentucky and West Virginia), Pennsylvania and Massachusetts, desired *that the Senators should be elected by the House of Representatives from a list furnished*.

This was the Virginia Plan, so-called, proposed by Mr. Madison. This, of course, would have left the larger and more populous States in complete control of both branches of the Federal Legislature. It was not until this point had been yielded, and it had been finally agreed that each State should select its own Senators and that the States should have equal voting power in the Senate that the controversy ended and the settlement was reached.

It was provided in the original Constitution that these Senators should be selected by the State Legislatures, whereas under the recently adopted 17th Amendment the people of each State vote directly for

their Senators. In either case they are equally the choice of the electors, the people *whom the State itself has seen fit to clothe with the right to vote*. Now, it must be manifest that if amendments to the Constitution, like the 19th, may be lawfully adopted whereby and wherein persons may be designated, or classes of persons may be designated, in a State, to whom shall be given the right to select Senators, these Senators will be no longer in any true sense selected by the State; they will be selected to a large extent at any rate by persons whom the State has never authorized to vote for them, and that State will cease to have *any* "suffrage" in the Senate.

In this way this great "palladium to the residuary sovereignty of the States," as Madison called it, would be in effect completely broken down.

This contention will be found clearly set forth in Petitioner's Third Prayer which was refused by the Court below (Record, p. 142).

PROPOSITION IV.

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it MAY be deprived of its equal suffrage in the Senate; and, second, THAT IT MAY NOT BY ANY AMENDMENT BE DEPRIVED OF ITS POWER TO GIVE OR REFUSE ITS CONSENT.

If the latter contention be not true, then in order to absolutely nullify this "palladium to the residuary sovereignty of the States" it would be only necessary to adopt an amendment changing its electorate to a sufficient extent.

It is easy to see if any interference with the electorate of a State is permitted its power to refuse its consent to any amendment which may *hereafter* be proposed, including an amendment reducing the number of its Senators, may be taken away. All it would be necessary to do to accomplish that purpose would be to designate in the proposed amendment some class of persons or some person who were or was to be solely permitted to vote for Senators and Legislators in Maryland, who were known to be in favor of such change or reduction in the representation of Maryland in the Senate, and the same result would have been attained indirectly as would have been accomplished by the enactment of an amendment in the first instance reducing Maryland's representation in the Senate to one or to nothing.

An excellent illustration of what we mean is furnished by the action of the State of Vermont upon the Nineteenth Amendment. Prior to the proclaiming of the amendment by the Secretary of State, the Governor had refused to call into session the Legislature of that State to ratify.

Subsequent to the proclaiming of the amendment, however, and *when the women were voting* in Vermont in pursuance thereof, a Legislature elected under Woman's Suffrage passed a resolution ratifying the amendment, thus demonstrating the fact that the State of Vermont as that State was constituted prior to the proclaiming of the amendment had been deprived of its power to refuse to consent to any amendment which might be proposed.

Our contention is this: The clear and necessary effect of the proviso reading "that no State *without its consent* shall be deprived of its equal suffrage in the Senate" is as follows:

The power of a State to consent or refuse to consent to amendments which may operate to deprive it of its equal suffrage in the Senate is expressly reserved and withheld from the scope of the amending power altogether.

Now whatever method may be recognized by the Constitution as the method by which the State may express its consent or its refusal to consent, that is, whether this consent may be given or refused by the Legislature of the State, or by its people in Convention, or even, had it been so provided, by a referendum vote, *in any case* the vote of the State's electorate is indispensable. The State's own voters must elect the Legislature or the Convention, or if it had been permitted, must vote on the referendum.

The consent of the State cannot be given or cannot be refused except by the will expressed either directly or indirectly of the State's own voters.

Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether.

From the beginning of this case in the Court of Common Pleas, and again in the Court of Appeals of Maryland, we have challenged our opponents to answer

this proposition. Up to the present time it has remained unanswered.

"Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarranted transposition of power, and as a premeditated engine for the destruction of the State Government? The violation of principle in this case would have required no comment."

And a little earlier in the same article:

"Every government ought to contain in itself the means of its own preservation."

Alexander Hamilton, "Federalist," No. 59, pages 238, 239. (The italics are by Hamilton.)

How can these governments contain the means of their own preservation unless this Court has and will exercise the power to preserve them?

How can a State have the *power to consent* if its *means of consenting* may be taken away and this Court refuses to prevent it?

PROPOSITION V.

The various cases decided by this Court since the Civil War, including the case of *Myers vs. Anderson*, 238 U. S. 368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this Court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the

States—has been, in fact, consented to, however reluctantly, by each and all of them, is valid and had to be accepted by this Court as being valid when the question of its validity was raised for the first time in *Myers vs. Anderson*, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

We may assume for the sake of the argument (and only for that purpose—see Original Brief, pages 94-100), that if the Fifteenth Amendment had been adopted in time of peace, the same objections to its validity could have been urged which are now being urged against the Nineteenth; provided its validity had been challenged at the time of its adoption, or, at any rate, within some reasonable time thereafter.

But it must be conceded that any amendment, however radical the change it made in the Constitution of a State, which has once been actually consented to by each and all of the States in the Union, will have to be recognized as valid by this Court.

And that is exactly what has happened in the case of the Fifteenth, as well as the Thirteenth and Fourteenth Amendments.

So far as the seceding States were concerned, this consent was given by the formal action of their respective Legislatures. It may be perfectly true that it was an unwilling consent in the case of most of them. It was a consent which they were compelled to give by the action of Congress in pursuance of its policy of reconstruction. It may be said that it was given under duress, but, as we say in our Original Brief (page 90),

"however duress may be held to avoid individual contracts, it is emphatically true that it is no defence against the enforcement of the obligations of sovereign States. The Treaty of Versailles is just as binding and will be recognized by this Court as just as binding upon Germany as any ordinary treaty of commerce and amity entered into by her in times of peace."

While it may be true that no formal treaty of peace was entered into by the Government of the United States and the Confederate States, or any of them, the substance of a treaty was enacted in the three articles of amendment of the Constitution, the Thirteenth, Fourteenth and Fifteenth, settling for all times the questions which caused or which grew out of the Civil War, and which it was deemed necessary to have settled in order to prevent the possibility of the revival of the controversies between the States which had caused that War.

Slaughter-House Cases, 16 Wall. 36, 67, 71.

It may be true that this involves the contention that the effect of war and the necessity of taking measures to prevent the recurrence of war, *expands* the amending power, but it is submitted that there is nothing unreasonable in that contention.

The same effect would undoubtedly be produced by the same causes upon the Treaty-making Power. While the power to make treaties with foreign countries is conferred by the Constitution upon the President, subject to the ratification of the Senate, in the broadest possible terms, nevertheless, this Court has held:

"The treaty power, as expressed in the Constitution, is in terms unlimited *except* by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

Geofroy vs. Riggs, 133 U. S. 258, p. 267.

This, of course, is all true as regards a treaty made in time of peace. But suppose the United States were to become involved in a war with a foreign power and its Navy were to be destroyed, its land forces defeated and it found itself in a situation where in order to prevent the complete subjugation of the whole country it was necessary to make a treaty of peace which included the cession of some portion of the territory of a State without the consent of that State. Would this Court consider itself at liberty to refuse to recognize that treaty as being valid and binding?

We know very well that it would not—that it could not. If, after the expiration of a period of forty-five years the validity of that treaty were called in question as the validity of the Fifteenth Amendment was called in question for the first time in the case of Myers vs. Anderson, 238 U. S. 368, would not this Court deal with the objections to its validity in the same way in which it dealt with the objections urged against the validity of the Fifteenth Amendment in that case, viz:

Ignore them altogether and decide all other questions raised in the case with the tacit assumption that the treaty was valid.

All the non-seceding States, some of them, it is true, very reluctantly, ultimately gave their consent to the Fifteenth Amendment.

It is true that the Legislatures of some of them had refused to ratify the Amendment. Such was the case in Maryland, Delaware, Kentucky, Tennessee, Oregon and California. But after the Amendment had been proclaimed, these States, each and every one of them, and the people of these States, evidenced their consent to and acquiescence in it in the clearest possible way, by not only refraining from contesting it or challenging its validity for forty-five years, but in each and every State, the people acting through successive legislatures passed laws either for the enforcement of the amendment or in recognition of its valid existence.

It is true that during all this time, as we have hereinbefore observed, the voice of the State governments was throttled by the new constituency. The officials of the State being responsible to a new constituency could hardly be expected to institute proceedings to disfranchise a part of that constituency any more than they have done in the case now before this Court. But it is to be remembered, of course, that it is the people who vote that politically constitute the State, and each and every one of them had during that whole period of forty-five years the right to contest the validity of this amendment on his own behalf and that of his fellow-voters, or his fellow-citizens, and they did not do it.

The conclusion that the Fifteenth Amendment had been accepted or assented to unanimously by the several States of the Union, and especially by the people of the several States, is therefore one which the Supreme Court was bound to indulge when after forty-five years the validity of the amendment was challenged.

The 15th Amendment was not necessarily invalid. If consented to by the people of the several States it would become valid. No better evidence of consent is known in law than the failure to object when opportunity to object is offered.

That consent may be inferred from long acquiescence is a doctrine too familiar to be disputed, and that consent will validate amendments that are expressly declared to be invalid without consent is too obvious to be questioned.

The *assumed* validity of the 15th Amendment can therefore form no precedent for this case.

For further discussion on this point, see Original Brief, pages 85-100, under the head: "The Fifteenth Amendment and Decisions Thereunder Do No Govern this Case," and especially the sub-head (b) "The Conditions Under Which Reconstruction Was Accomplished After the Civil War Removed the Question of Consent From the Realm of Judicial Decision," and (c) "Example in Creation of West Virginia" (pages 90-93).

PROPOSITION VI.

The Nineteenth Amendment has never been legally ratified by the requisite number of States, even assuming that the

State Legislatures are competent to ratify an amendment like the Nineteenth, which radically changes, and, in fact, nullifies so vital a part of their State Constitution as that which limits the right of suffrage to men, by conferring it upon women. Neither Tennessee nor West Virginia ever ratified at all.

1. Tennessee and West Virginia in fact refused to ratify the Amendment. Both of these States must be counted in order to make up the requisite thirty-six, or three-fourths.

a. That the Legislature of Tennessee not only did not ratify, but actually rejected the amendment by a large majority appears from a simple inspection of the official record of the proceedings of that Legislature produced in evidence in this case (Record, page 11, 29). That record shows these simple facts, viz: That a resolution ratifying the Amendment was submitted to one branch of the Legislature and adopted by a majority of one vote; that immediately thereafter and within the time prescribed by the law of the State, a motion to reconsider this resolution was made; that pending this motion the action of the House on the resolution was not final; that a few days later when there was no quorum and nothing approaching a quorum present, this same House defeated the motion to reconsider; that ten days later at a session of the House when there was for the first time a quorum present, the motion to reconsider was adopted by an overwhelming majority, the resolution of ratification defeated and all the proceedings taken by the rump House in the absence of a quorum expunged from the record.

There was never any certificate by the Governor of Tennessee to the Secretary of State of the United States to the effect that the resolution of ratification had been adopted "in accordance with the Constitution," as provided in R. S. 205, or even in accordance with the requirements of the law of Tennessee.

The contention that this Court cannot look at that record cannot be sustained by any authority.

No Court of Tennessee or any public official clothed with the power or jurisdiction to do so, has passed on the question as to whether the amendment has been legally ratified by the Legislature of that State, but it has been held by the Courts of that State in the cases referred to in our Original Brief, that in a case of this kind those Courts will inspect the record for the purpose of determining as a matter of fact if the law or resolution in question has been adopted in the manner required by the law governing the procedure of the Legislature, and it is submitted that this Court has the power to do the same in a case like the present where the Tennessee Court has not acted.

For a full discussion of this point, see Original Brief, page 100, and sections of brief there referred to on page 13.

b. In the case of West Virginia it appears that the Senate finally defeated the resolution of ratification on March 3, 1920, the action of the Senate taken on that day having that effect according to the local law. It was, however, prevented by the refusal of the lower House, from adjourning, and when after an interval

the two members absent on that date appeared, one of them only being recognized as entitled to a seat, and the other being ousted, the whole matter was brought up again, contrary to the established rules, and by the help of the former absentee, who was seated, the resolution was again put to a vote and declared carried.

We submit that we have shown clearly that by the settled law of the State of West Virginia the earlier action of the House was, under the circumstances, the only authentic action in the premises (Original Brief, pages 102, and 12).

2. The Legislatures of five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, were, by the provisions of their respective State Constitutions, expressly forbidden to adopt amendments of the character of the Nineteenth, and were therefore incompetent to ratify that amendment.

As regards the case of Missouri, the situation is simply this: The Constitution of that State provides as follows:

"Article II, Sec. 3. We declare that Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

That the Nineteenth Amendment impairs the right of local self-government is, of course, manifest.

If an amendment which takes away from the people of the State—those who constitute the whole body politic—the electorate—the right to say who shall be admitted to participate with them in the power of government,—who shall constitute the electorate, who shall be the State, who shall vote at the State elections,—does not interfere with the right of local self-government of that State, nothing can.

The only question is whether or not this provision of the Constitution of Missouri is in conflict with and is nullified by the provisions of Article V of the Federal Constitution. We submit that there is no such conflict. It is true that the power of the Legislature of Missouri to ratify Federal amendments is derived from Article V. The State has not conferred, and it may be, that it could not confer any such power upon its Legislature.

But let us examine the language of Article V on this point. It is this: That "Congress shall have power to propose amendments, which * * * shall be valid to all intents and purposes as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof."

Now who is to say "when" these Legislatures or these Conventions shall act on an amendment or proposed amendment? Certainly no language can be found in Article V conferring upon Congress the power to do so.

There is a marked difference between this part of Article V and the provisions of Article I of the Constitution relating to the election of United States Senators. While the Senators were to be elected by the State Legislatures, the time and manner of the election was subject to the regulation of Congress. But here is no such grant to Congress of the power to prescribe the time at which or the manner in which the Legislatures shall act in ratifying a proposed amendment.

Obviously the Legislature being the creature of the Constitution of the State can only act at the time and in the place and in the manner prescribed by that Constitution. That State Constitution being the creation of the people of the State, the people of the State may provide therein that the Legislature *shall not assemble at all* for an indefinite time.

There is no Legislature in any legal sense until the persons elected to serve as members of that body shall have been called together at the time and in the manner prescribed by the people in the Constitution.

It is plain, therefore, that if the people of Missouri had a right to say "when" their Legislature shall act on this amendment, they had the right to say "never"—that it should never act on any amendment of this character. And they have said so in their Constitution. Who shall say them "nay"?

Certainly Article V imposes no *duty* either upon the Legislature or upon the people of Missouri to act upon any amendment until they are ready to do so. It simply confers upon them the *privilege* through their

Legislature or Convention, as the case may be, to ratify a proposed amendment and thereby cast one vote in favor of its adoption as a part of the Constitution of the United States. Therefore, when the Legislature of Missouri ratified this amendment in defiance of the prohibition contained in its State Constitution, they acted at a time when they had no power to so act, because they had been forbidden to act by the only authority which had the right to determine *when* they should act.

The case of Tennessee on this point is even clearer. The Constitution of that State provides as follows:

"Article II, Section 32. Amendment to Constitution of the United States:

"No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such convention or general assembly shall have been elected after such amendment is submitted" (Record, p. 27).

Now it appears from the evidence in the Record (pages 54-65) and is conceded (page 157), that the General Assembly of Tennessee which acted on the amendment had been elected *before* the amendment was submitted or proposed by Congress.

This provision of the Constitution of Tennessee was manifestly intended to prevent its Legislature from exercising the power conferred by Article V to ratify amendments to the Federal Constitution, especially amendments such as the Nineteenth, which radically change and nullify the most important provision of its

own Constitution relating to suffrage, until such time as the people of Tennessee should have had an opportunity to elect a Legislature which would actually represent their wishes in regard to so vital a matter. It would seem to be simply incredible that the statesmen who constituted a majority, at any rate, of the Constitutional Convention of 1787—jealous as they were of the rights of their sovereign States—intended by the language used in Article V to deprive the people of any State of a right so essential to their very existence as a State.

The obvious purpose which the people of Tennessee had in adopting this provision of their State Constitution was to prevent their Legislatures from acting hastily and without taking time to ascertain the sentiments and feelings and wishes of the people themselves regarding so vital a matter as a change, perhaps a radical change, in the Federal Constitution.

It was an effort to protect themselves against one of the gravest of calamities that can befall a people,—the government of statesmen in a hurry.

We feel assured that this great Court will concur with us in the view that any official,—executive, legislative or judicial,—State or Federal,—who acts hastily and without the most thoroughgoing consideration upon questions of this character is simply false to his trust.

No better illustration could be furnished of the importance,—nay, it may almost be said, of the necessity,—of a provision of this kind in State Constitutions

than that which is afforded by the history of the manner in which and the circumstances under which this so-called Nineteenth Amendment was rushed through the Legislatures of so many of the States of this Union. In many of these bodies it was not even debated. Some of them actually raced to see which could ratify quickest. In the case of 12 States the Legislatures voted in flat defiance of an overwhelming public opinion on the question of suffrage expressed at the polls in their States but a short time before. And in 34 out of 37 States the Legislatures had been elected before the amendment was proposed, so that the people had never had an opportunity of electing the kind of men whom they might have wished to elect had they known that so grave a question would be submitted to their decision.

If this amendment could be carried through by such methods as these, it is easy to see that other amendments will be carried through in the same fashion to the ultimate wreck of our whole system of Constitutional representative government. The suggestion that this great Court shall sit complacently by, powerless to protect our constitutional system of representative government from such wrecking methods as these is not a pleasing thought.

In any event, when the provisions of Article V are read in connection with the history of the times, and especially with the debates of the Conventions which attended its adoption, no such conclusion would seem possible. (See Original Brief, pages 103, 104, 111, 113.)

The States alone determine the "times, places and manner" in which their Legislatures shall vote on ratification of amendments, and clearly they may fix such times as are reasonable.

The Constitutions of the States of West Virginia, Texas and Rhode Island also contain provisions, which although perhaps not quite so specific as those of the Constitutions of Missouri and Tennessee, are manifestly intended to prohibit their Legislatures from ever ratifying amendments such as the Nineteenth. That will be found fully discussed in our Original Brief, pages 102 to 117.

CONCLUSION.

The gravity of the question presented for adjudication in this Court need scarcely be enlarged upon. It is greatly accentuated by the political conditions and tendencies of the hour. Especially the tendencies which have developed since the decision of this Court in *Rhode Island vs. Palmer*, wherein it was held that the adoption of an amendment like the Eighteenth, which not merely confers upon Congress the power to enact a Prohibition law, but which is itself the direct enactment of a Prohibition law, was within the scope of the amending power.

Prior to that amendment the right to legislate with reference to the manufacture, sale, importation or exportation of intoxicating liquors was one of the powers not delegated to the United States, but reserved to the States in Article X of the Federal Constitution.

This decision will certainly be cited as a precedent for holding valid any future amendment or any number of successive amendments which may be proposed, transferring other reserved powers of the States to the United States.

If this process should continue long enough it will necessarily result in the gravest of calamities,—the final extinction of all State powers, the establishment of a consolidated central government at Washington like that of ancient Rome, which is said to have broken down of its own weight.

That the enactment, through the machinery provided for amending the Constitution, of laws local in their nature and effect, which neither the Congress which proposes them nor the State Legislature which votes for their enactment has power to amend, alter or repeal, may ultimate in a situation most perilous to our institutions, none can fail to see. "Where there is no vision the people perish." But this drift towards centralization and the enactment of irrevocable laws may be arrested, and in all human probability will be, provided the several States preserve their "independent autonomy,"—their power to refuse to consent to proposed amendments. They lose that independent autonomy the moment that it is decided that the power of amendment delegated in Article V of the Federal Constitution to Congress and some of the State Legislatures goes to the extent of authorizing an amendment which deprives any State, without its consent, of its right to say who shall vote at its own elections, who shall grant its consent.

If this Court should find itself compelled to hold that it has no right to declare amendments of this kind void, but must sit here powerless to defend this great fabric of Constitutional Government against such attacks as these, the same result will inevitably follow as would have followed if it had adopted that view of its power and its duty when the question of whether it could protect the Constitution against such attacks from Congress alone first came before it for decision in *Marbury vs. Madison*—one hundred and eighteen years ago.

Respectfully submitted,

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For Petitioners and Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

OSCAR LESER ET AL.	} No. 553.
v.	
J. MERCER GARNETT ET AL.	

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

The Solicitor General, on behalf of the United States, moves the Court to permit the Government to file this brief as *amicus curiae* in the above-entitled case.

It is not necessary to suggest the interest that the United States has in the controversy, for it concerns the action of the political branch of the Federal Government in proposing an amendment to the Constitution and in subsequently promulgating the fact that such amendment had been duly ratified by the requisite number of States. Should this Court reverse the decision of the Court of Appeals of Maryland and sustain the contentions of the learned counsel for the appellant that the Nineteenth Amend-

ment is not a part of the Constitution, such position would concern not merely the immediate litigants but the whole people of the United States.

I have already set forth in my brief in *Fairchild v. Hughes* (Docket No. 148) the views of the Government with respect to the contentions of the learned counsel for the appellant in the instant case, and as the two cases will be heard at the same time, it will not be necessary for me to restate the arguments submitted in the *Fairchild* brief.

I recognize that there are two important differences between the two cases, which will make the first two points of my brief in the *Fairchild* case inapplicable to the instant case. In that brief I argued (pages 5-13) that the plaintiff did not have a sufficient status with respect to the controversy to make his bill in equity a "case" under the judiciary article of the Constitution; and I further argued that, inasmuch as the bill in equity in that case was to restrain the Secretary of State from promulgating the ratification of the Nineteenth Amendment, and as, after the dismissal of the case in the Court below, the Secretary of State *had* made the proclamation, the point at issue in that case was now moot.

In the instant case the question arises in a different way, and the question whether the Court of Common Pleas of Maryland properly refused to strike from the registry lists the names of the two women, who were registered as voters, seems to me to present a concrete "case" within the meaning of the Judiciary Article, and the only question therefore involved in

the instant case is whether, under the Nineteenth Amendment, the two women were properly registered as voters.

The question, therefore, as to the validity of the Nineteenth Amendment and the method of its adoption—if, indeed, it be longer open to judicial controversy—seems to be justiciably presented by the record in this case.

I believe that in my brief in the case of *Fairchild v. Hughes* I have anticipated the main contentions advanced in behalf of the Appellants in the instant case, and to avoid useless repetition of printed matter I respectfully ask that my brief in the case of *Fairchild v. Hughes*, especially the portions between pages 13 and 36, may be regarded as my brief as *amicus curiae* in the instant case.

I did not discuss in the brief in the *Fairchild* case the peculiar construction which counsel for the appellants in the instant case gives to the clause of Article V of the Constitution which refers to "equal suffrage in the Senate." I had supposed—and I have never until this controversy heard or read any contention to the contrary—that all that the framers of the Constitution meant when they provided that—

No State, without its consent, shall be deprived of its equal suffrage in the Senate—
was that, while the membership in the House of Representatives should be proportionate to population, each State—large or small—should be entitled

to the same number of representatives in the Senate. There is nothing in the debates in the Constitutional Convention that would indicate that the framers of the Constitution had in mind the character of the electorate, which should select the State legislatures, who, in turn, should select the Senators in behalf of the States. Since the Constitution was adopted the election of Senators has been taken from the State legislatures; but the fact that the people now themselves directly select the Senators, if it have any application to the validity of the Nineteenth Amendment, sustains such validity; for if the people of the United States, through the process of amendment, may provide that the people of the States shall themselves select their representatives in the Senate, there is an added reason why the power of amendment should be broad enough to provide, with respect to the question of discriminations between the sexes in suffrage, that there should be a uniform rule.

While it seems unnecessary to amplify my argument in *Fairchild v. Hughes*, yet two additional suggestions occur to me, which I respectfully submit to the Court.

I.

I desire, in the first place, to suggest the question whether, when the political department of the Government has proposed an amendment and three-fourths of the States have certified to the fact that they have adopted it, the Constitution ever intended to confer upon the judiciary the power to sit in judg-

ment upon such concurrent action of States and Nation which, in its essence, is political in character. Unquestionably the Constitution expressly delegates to the Federal judiciary the power to sit in judgment upon the law, or even the constitution of a State when either discloses an indubitable repugnancy to the Federal Constitution. Unquestionably also it is a general and vital implication of the Constitution, while not so expressly provided, that the judiciary, as the balance wheel of the Constitution, can pass upon the validity of acts of the coordinate branches of the Government—the Legislative and the Executive—which are repugnant to the Constitution.

But does it follow that when the Nation and the States, as political entities, determine to amend the Constitution under the powers vested in them by Article V, the judiciary has been given a power to pass upon these political acts which are, in their nature, outside of the ordinary workings of the Government?

Suppose that, on the request of two-thirds of the States, the Government should call a general convention to amend the Constitution, and that convention should meet. It would represent the people, in whom the residuum of all political powers remains. Can it be that this court—which is but one department of the Government—could pass upon the validity of the acts of the general convention, which, pursuant to call authorized by the Constitution, had made and recommended changes to the Constitution? To impose this duty upon the judiciary would be a

long step in advance of anything that was decided by this court in *Marbury v. Madison*.

In that connection, let me quote what James Wilson so well said in the Pennsylvania Convention of 1788:

Perhaps some politician who has not considered with sufficient accuracy our political system would observe that, in our Governments, the supreme power was vested in the Constitution. This opinion approaches the truth; but it does not reach it. The truth is that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.

If, then, such a general convention should meet, it would represent, in a peculiar sense, the people in their primary capacity, who, viewing our Constitution not subjectively but objectively, would determine to what extent, if any, they wished to modify it. I gravely question whether such a convention, duly called in accordance with the Constitution, could be subjected, as to its political acts, to the supervision of the judiciary. In other words, the situation would be in analogy to that upon which this court passed in *Luther v. Borden*, 7 Howard, 1, where there being two political bodies in Rhode Island, each claiming to be its true government, this Court held that it was beyond its power to review the action of the President in recognizing one and refusing to recognize the other. The action was deemed so peculiarly

political in its nature as to be—to use Madison's phrase—"extra judicial."

II.

The only other point which I desire to emphasize, in addition to my suggestions in the brief in *Fairchild v. Hughes*, is the fact that, in the practical workings of a constitution, questions, especially those of a political nature, are often determined by the practical construction which the people themselves place upon their constitution or upon laws. This was recognized by this Court very early in the history of the Government.

This Court had only commenced its sessions in 1790, when a question arose as to the validity of the Judiciary Act in naming the judges of the Supreme Court to be judges of the Circuit Courts. Chief Justice Jay and his associates made a formal protest to the President against this addition to their duties, on the ground that the law was unconstitutional. Pending the determination of the question, the judges did act as Circuit Judges under protest, and the question did not come, as a concrete case, before the court until 1803—thirteen years later. Marshall had succeeded Chief Justice Jay, and stated to his associates that he agreed with them as to the invalidity of the law which imposed upon the Supreme Court judges the duty of Circuit Judges; but the Court reached the conclusion that, in view of the acquiescence in the law for thirteen years, its validity must be assumed. (This statement is made on the

authority of Chancellor Kent in an article in 3 N. Y. Review, 347, published in 1838.)

In the practical workings of government, constitutions as well as laws are often determined by the practical construction which the people themselves place upon them, and this is peculiarly true in the instant case. The right of the people to amend their Constitution, so as to prevent any State from discriminating in the matter of suffrage on account of "race, color, or previous condition of servitude" has been acquiesced in by the American people for over fifty years. It is unquestionably the law of the land. All that the Nineteenth Amendment does, in substance, is to add the word "sex" to race, color, or previous servitude. Similarly with the Nineteenth Amendment, the American people thus put a practical construction upon the nature of their institutions, when, without a challenge in any part of the country, except in the instant case, millions of women voted on the assumption that, under the Nineteenth Amendment, such was their right. Considering the size of the electorate and its distribution over a vast country, it would be difficult to imagine a more general acquiescence by the American people in an essentially political act than was witnessed in the last Presidential election.

To invalidate the Nineteenth Amendment, on the ground that it exceeds the power of amendment under the Constitution, would necessarily mean that the Fifteenth Amendment was equally in excess of the Constitution. The acquiescence by the American

people in such power of amendment for over a half century has settled that question. To suggest that the enfranchisement of the negro race was the result of a great war, does not answer the question. That, when that war ended, an amendment was adopted to secure negro suffrage, and that, for more than half a century, its validity has never been judicially challenged, is beyond question. To attempt, at this late day, to deny such power of amendment is similar in kind, although differing in degree, to an attempt to set aside Magna Charta on the ground that King John acted under duress, or to set aside the whole Constitution of the United States on the ground that the Convention which adopted it acted—as it clearly did—in excess of its delegated authority.

I need not further argue the questions of law, so ably argued by the learned counsel for the appellant, for I have anticipated them in the *Fairchild* brief. Moreover, the very able briefs filed by the Attorney General of Maryland and by the counsel for the intervening petitioners, and the—as it seems to me—unanswerable argument in the very able opinion of the Court of Appeals of Maryland (114 Atl. 840), seem to make an argument in behalf of the United States superfluous.

JAMES M. BECK,
Solicitor General.

JANUARY 20, 1922.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,

VS.

J. MERCER GARNETT, ET AL.

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETI-
TION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND.**

The application for a writ of certiorari in this case, the Record having been transmitted upon writ of error, is made as a matter of caution.

The petitioners already had sued out a writ of error under Section 237 of the Judicial Code as amended by the Act of Congress approved September 6, 1916, which provides for the "re-examination and reversal or affirmance of any final judgment or decree in any suit in the highest Court of the State * * * where is drawn in question * * * the validity of a statute or an authority exercised under any State on the ground of their being

repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity."

In this case the defendants, the Board of Registry for the Seventh Precinct of the Eleventh Ward of Baltimore City, acting as officials of, and therefore under authority of, the State of Maryland, undertook to enforce the so-called Nineteenth Amendment to the Constitution, by registering two women voters who were not entitled to be registered under the Constitution of the State of Maryland. The validity of this authority so exercised was drawn in question by the petitioners, themselves residents, voters and citizens of the State of Maryland, on the ground that the said alleged Nineteenth Amendment was not such an amendment as was authorized to be either proposed by Congress or ratified by the Legislatures of three-fourths of the States, but was actually in effect prohibited by Article V of the Constitution of the United States, and the decision of the Court of Appeals of Maryland was nevertheless in favor of the validity of the said authority (although such decision was based purely and solely upon the ground that that Court felt constrained, by the supposed precedent of the Fifteenth Amendment, not to consider the arguments against the validity of the Nineteenth).

We understand the defendants in error to contend, however, that no writ of error will lie in this case, and out of abundant caution we therefore pray that a writ of certiorari be issued.

The right to grant a writ of certiorari in any event will seem to be clear under the latter clause of Section 237, which provides for the granting of such a writ in case where any right, privilege or immunity is claimed under the Constitution by either party, and the decision of the

State Court is for or against said claim, as shown in our petition.

It is submitted that unless this Court shall pursue the course frequently adopted where, as here, there are a writ of error and a petition for certiorari pending in the same case, and hear both questions at the same time, it should now grant the writ of certiorari for the following reasons:

1. This case will present to this Court for the first time on its merits, the question as to whether or not there is *any* limit to the power to adopt amendments to the Constitution delegated by the people in adopting the original Constitution to certain agents, viz, the two Houses of Congress and the Legislatures of three-fourths of the States. For it is obvious that if this delegated amending power goes so far as to authorize these agents to change the electorate of a State in one way, it would authorize its change in any other way, and it would be impossible to draw any line short of a change which would practically destroy the State itself by placing all its powers of government in the hands of a selected few to whom alone the privilege of voting might be restricted, or in the hands of any people or class of people upon whom the State itself had not seen fit to confer the right of voting.

2. This case also presents the question as to whether or not such an amendment as the Nineteenth, whereby the exclusive right to vote for United States Senators is taken away from the men of the State—the people upon whom the State itself has seen fit to confer that exclusive right, and the right so to vote conferred upon an equal or greater number of women, is not in effect expressly forbidden by Article V.

Article V, while authorizing the proposing by Congress and the ratification by the Legislatures of three-fourths of the States of amendments in general terms, contains one express proviso and prohibition, viz, that no amendment shall be adopted by these agents whereby “a State *without its consent* shall be deprived of its equal suffrage in the Senate.” This prohibition was intended to be perpetual so far as the exercise of this power by these agents, to wit, Congress and the State Legislatures, was concerned. It was intended to be a perpetual, irrevocable guarantee to the States of equal representation in the Senate by Senators of their own choosing, *and by necessary implication a guarantee in perpetuity that there should remain in each State the power to give or refuse its consent.*

The Nineteenth Amendment, by changing the electorate of the State, deprives the State, *as constituted prior to this amendment*, of the power to give or refuse its consent to any amendment which may hereafter be submitted reducing the number of Senators to which the State shall be entitled, or in any other way destroying its equal right of suffrage in the Senate. It does more. It actually deprives the State, as heretofore existing and constituted under its own laws, of the right to choose Senators, and hence *deprives it directly of its suffrage in the Senate.*

3. The case also presents to this Court for the first time, the question among others, whether or not a Legislature of a State is authorized to ratify an amendment to the Federal Constitution which changes the Constitution or form of government of the State itself, when it is not authorized by the State Constitution to do so directly, or whether such amendments to the Federal Constitution

must be submitted for ratification to a convention of the people.

4. The case also involves the question whether the action of this Court in the case of *Myers vs. Anderson*, 238 U. S. 368, in refusing to consider any arguments against the validity of the Fifteenth Amendment, which had remained unchallenged and had been in effect acquiesced in and *consented* to by every State in the Union for nearly fifty years, constitutes a precedent for this Court refusing to consider contentions against the validity of other amendments whereby the electorate of a State may be interfered with or abolished, when such State's consent could *not* be imputed to it or presumed.

5. The case also involves the further question as to whether the amendment has, in any event, been ratified in a lawful way by the legislatures of the necessary three-fourths of the States,—it being claimed that in some instances, at any rate, those ratifications were absolutely null and void as being in flagrant disregard of the constitutional provisions of such States regulating the proceedings and limiting the powers of their legislative bodies, and for the further reason that in certain of said legislatures the final vote of at least one House upon the question of the ratification of said amendment was *against* ratification and not in favor thereof, as appears from the Journals of the respective Houses involved, which are found in the Record of this case, and which by the law of the States in question, are final evidence of what action their legislatures actually took in the premises.

It is apparent that none of these questions can be deemed to be settled until passed upon by this Court, and in order that they may be presented fairly on their merits

regardless of any doubt as to whether a writ of error is or is not allowable in this case, the plaintiffs in error have applied for the writ of certiorari.

Respectfully submitted,

WM. L. MARBURY,

For Petitioners.

INDEX.

	PAGE
PETITION FOR CERTIORARI.....	1- 6
Petitioners' Prayers.....	3
EXPRESS LIMITS OF AMENDING POWER.....	7-19
Suffrage States in Senate.....	7
Balance of Power.....	9
Senators of Their Own Selection.....	10
Fixing Qualifications of Voters.....	11
Corporate Voice of States.....	12
No Mandate for Ratification.....	14
Effect on Male Suffrage States.....	16
Consent to 15th Amendment.....	17
No Consent to 19th Amendment.....	18
IMPLIED LIMITS OF AMENDING POWER.....	19-30
Fundamentals of Our Government.....	20-22
(Opinions of Supreme Court)	
Meaning of State Sovereignty.....	22
Indestructible Union of Indestructible States.....	23
Destructive Amendments Considered.....	25
People Alone Can Destroy States.....	26
Constructive and Destructive Amendments.....	27
Implied Limitations Illustrated.....	28
Scope of Sovereignty of People.....	29
NINETEENTH AMENDMENT NOT LEGALLY RATIFIED ..	30-34

State Constitutional Limitations Violated.....	31
Contentions of Appellees.....	32
Legislatures Subject to Law That Created Them	33

TABLE OF CASES

Cohens vs. Virginia, 6 Wheat. 264.....	26
Collector vs. Day, 11 Wall. 113.....	20
Quinn vs U. S., 238 U. S. 347.....	19
Haire vs. Rice, 204 U. S. 291.....	33
Hammer vs. Dagenhart, 247 U. S. 251.....	22
Hawke vs. Smith, 253 U. S. 221.....	31, 32
McCulloch vs. Maryland, 4 Wheat. 316.....	12, 21, 33
Myers vs. Anderson, 238 U. S. 368.....	19
Sturges vs. Crowninshield, 4 Wheat. 193.....	21
Texas vs. White, 7 Wall. 700.....	20, 24

IN THE
Supreme Court of the United States

OSCAR LESER ET AL.,

versus

J. MERCER GARNETT ET AL.

**PETITION FOR WRIT OF CERTIORARI TO BE
ISSUED TO THE COURT OF APPEALS
OF MARYLAND.**

*To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court:*

Petitioners are male citizens, residents and qualified voters of the State of Maryland. The Constitution of the State of Maryland limits the right of suffrage to adult male citizens possessing certain qualifications as to residence. The laws of Maryland provide a method of having the right of any person to vote in any given election precinct judicially determined by challenging such person's right to register as a voter, and if the challenge be overruled and the person registered by the officers of registration, by petitioning a Court having jurisdiction in the City or County where the matter arises to correct the registry by striking off the name of the person so challenged. Under the election laws of Maryland no

person whose name does not appear on the book of registry can cast a vote. (1 Annotated Code of Md., Art. 33, Secs. 19, 25).

Petitioners challenged the right of two women, Cecilia Streett Waters and Mary D. Randolph, to register as voters of the Seventh Precinct of the Eleventh Ward of Baltimore City, on October 12th, 1920, on the ground that being women they were not entitled under the State Constitution to vote, and that the alleged Nineteenth Amendment to the Federal Constitution which was proclaimed to have been ratified by the Legislatures of three-fourths of the States, and to be a part of the Constitution of the United States, by the Secretary of State of the United States on August 26th, 1920, prohibiting discrimination in the qualifications of voters on account of sex (a) was never legally proposed, ratified or adopted as a part of the Constitution, and (b) was invalid as being in excess of any power to amend the Constitution of the United States conferred by the provisions of Article V thereof. The challenge was overruled and the women were registered as duly qualified voters, and thereafter the petitioners appealed by petition, as provided by law, to the Court of Common Pleas, which after hearing testimony and argument, refused the prayers or instructions offered by petitioners and dismissed the petition.

Petitioners appealed to the Court of Appeals of Maryland, being the highest tribunal in the State in which a decision could be had, and that Court, on June 28th, 1921, affirmed the order of the Court of Common Pleas dismissing the petition.

Certain prayers were offered by the petitioners containing the legal propositions on which they rested their case. All were rejected by the Court. They are set forth

in the Fourth Assignment of Error filed in the Record of this cause. Among them are the following:

PETITIONERS' FIRST PRAYER.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is not an amendment within the scope of the grant of power to amend contained in Article V of said Constitution.

PETITIONERS' SECOND PRAYER

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is in conflict with the proviso contained in Article V of the Constitution of the United States.

PETITIONERS' THIRD PRAYER.

The Court rules as matter of law that a State's suffrage in the Senate means the votes cast in the Senate by Senators elected in the State by the people thereof, through Electors, who possess the qualifications of Electors of the most numerous branch of the State's Legislature, which qualifications are prescribed and determined by the State in its Constitution or laws, and any purported amendment to the Federal Constitution which nullifies, substitutes or alters the qualifications of such Electors so prescribed and determined by the State, so as to confer the power of electing Senators upon persons on whom the State has not conferred it, or to deny, diminish or dilute such power in the persons upon whom the State has conferred it, operates to deprive the State of its suffrage in the Senate, and that the alleged Nineteenth Amendment would so operate.

PETITIONERS' FOURTH PRAYER.

The Court rules as matter of law that the consent of a State to such changes in the Federal Constitution as by the provisions of Article V require such

consent, can only be expressed, whether directly or indirectly, through the voice of the majority of those persons upon whom it has conferred through its Constitution and laws the power to vote, and that any measure which confers such power upon other and different persons, or denies, diminishes or dilutes such power in those upon whom the State has conferred it, deprives the State of its power by any means to consent to such changes or amendments, and is inconsistent with the proviso contained in Article V of the Constitution of the United States; and that the alleged Nineteenth Amendment is such a measure.

The Legislature of Maryland, at its regular session of January, 1920, rejected the Nineteenth Amendment and by resolution challenged its validity, even if ratified by other States, as part of the Constitution, on the ground that it was in excess of the powers of amendment conferred therein. At a special session called in September of the same year a resolution was again offered to ratify the amendment which already had been proclaimed, but the Legislature again refused to ratify it and defeated the resolution.

It appears from the foregoing prayers, as well as from the challenge of said female registrants and from the petition itself, that the petitioners claimed a title, right, privilege or immunity under the Constitution of the United States, and that the said female registrants, and other female citizens of Maryland who intervened in the case by petition, and were represented by counsel at the hearing, both above and below, in opposition to the petitioners, also claimed a title, right, privilege, or immunity under the Constitution of the United States. The right or immunity so claimed by the said respondents and interveners, namely, the right to vote, or immunity from discrimination on account of sex in voting qualifications,

was sustained by the judgment of the highest Court in Maryland in which a decision could be had. The right or immunity claimed by the Petitioners, namely, not to have their votes nullified or diluted by the addition of persons legally disqualified, through the adoption by Congress and the Legislatures of other States of an alleged amendment not authorized by the provisions of Article V of the Constitution, and in fact forbidden by said Article, was disallowed by the highest Court in the State in which a decision could be had.

The Court also disallowed the right (or immunity) claimed by petitioners under the Constitution not to have their votes nullified or diluted by the addition of persons disqualified to vote, but claiming to have the right to do so by virtue of an alleged constitutional amendment, which, however, petitioners aver never received the assent of the Legislatures of three-fourths of the States as required by Article V of the Constitution.

The decision of the Court of Appeals of Maryland was, therefore, against the title, right, privilege or immunity, especially set up or claimed by the petitioners under the Constitution, particularly under Article V thereof, and in favor of the title, right, privilege or immunity set up or claimed by the respondents under the alleged Nineteenth Amendment to the Constitution.

The petition was brought for the express purpose of testing the validity of the Nineteenth Amendment, and of testing the limitations on the power to amend the Constitution expressed in Article V thereof, or implied from that and other clauses of the Constitution. The Court of Appeals of Maryland decided in favor of the alleged amendment and against the limitation expressed in Article V, and all other limitations on the amending

power set up or claimed under various Articles or sections of the Constitution.

Petitioners therefore pray that the writ of certiorari issue from this Court to the Court of Appeals of Maryland, in the usual form permitting a review on the record~~y~~ as made of the questions involved in this case.

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Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

LIMITS OF POWER OF AMENDING CONSTITUTION EXCEEDED BY XIX AMENDMENT.

1. THE POWER OF AMENDMENT CONFERRED ON CONGRESS AND STATE LEGISLATURES BY ARTICLE V IS SUBJECT TO THIS EXPRESS LIMITATION:

"PROVIDED THAT NO STATE WITHOUT ITS CONSENT SHALL BE DEPRIVED OF ITS EQUAL SUFFRAGE IN THE SENATE."

The right of the States to exercise equal suffrage in the Senate, and their power to express or to refuse consent to amendments of the Constitution attempting to deprive them of such equal suffrage, necessarily involves their independent control over their own internal suffrage.

If a State be compelled to suffer dictation as to who may or may not select its Senators, or members of the Legislature, or Conventions, then such Senators or members cannot be the free choice of their State and cannot, therefore, vote in her name or express her will.

SUFFRAGE OF STATES IN THE SENATE.

Let us suppose that a Constitutional Amendment be carried providing that in the future the Senators shall be appointed by the President. No one could deny that the suffrage of the States in the Senate would have been thereby abolished. And so if an amendment should confer on the President the power of designating electors for Senators, even though residents of the sev-

eral States to which respectively an equal number of Senators would be apportioned, no one could say that the Senators chosen only by Presidential appointees within the States would exercise in the Senate the suffrage of the States.

No difference in principle is perceived between such amendments and an amendment prescribing either affirmatively or negatively the qualifications of electors. Once concede that electors in a State may be qualified by a power external to that State and the State's suffrage in the Senate has been subjected to such external power, and therefore taken from the State.

The proviso of Article V excludes from the scope of the amending power a State's suffrage in the Senate, without the State's consent. Therefore it also excludes from the reach of such power, to impair or alter, the State's right to express or to refuse to express its consent. These two rights form the irreducible minimum of a State's corporate individuality as expressed in the Constitution.

No method is perceived by which the suffrage may be exercised or the consent of a State may be given except through the medium of electors, who under the Constitution must designate the Senators to exercise its suffrage or the legislators or members of a convention to express its consent. Manifestly if these electors may be changed by external power, the power that changes them may keep in view its desired ends and by suitable provisions so designate the electors that those ends may be attained. Thus the State's right to consent or to refuse to consent to amendments would be done away.

For instance,—let the end desired be the abolition of the equality of the States in the Senate,—an end for-

bidden by the Constitution without the consent of all the States. An amendment may, however, in the view of our opponents, be proposed by Congress and ratified by three-fourths of the legislatures, providing that all electors shall be subject to a test oath in which they swear to support the principle of proportionate representation in the Senate. All persons unable to subscribe to such an oath would be automatically disfranchised, and the legislatures of all States consisting only of persons favorable to proportionate representation, would thereupon unanimously ratify an amendment abolishing the equality of the States in the Senate.

Of what value then is the guaranty to the States of their equal suffrage in the Senate?

OUR SYSTEM OF BALANCE OF POWER.

The American system of government was novel in several particulars when adopted. In none more so than in the wholly new scheme of a balance of power between the people viewed numerically, and divided into equivalent fractional units, on the one hand, and on the other, the same people viewed in their organized, corporate, responsible capacity, as constituting a number of self-governing communities, with historical, social and legal institutions and traditions of their own. It would be inaccurate to say that this latter side is only the conservative side of the American people. The Senate is perhaps in general a more conservative body than the House, but the individual States which have elected the Senators have often been and still are the seed beds of every sort of "liberal," "progressive," or "radical" experiment in government. Without such communities in which such experiments could be made at a minimum of risk to the country as a whole it is hardly to be doubted that popular discontent would not infrequently

assume in this country a form far more menacing to orderly and civilized progress than it has ever done.

On the other hand, many salutary and highly practical reforms now generally in force throughout the land might never have been adopted at all, if it had not been possible to try them, State by State, until their desirability was demonstrated.

The independent existence of the States is the one fundamental element of balance in the Constitution. The other great check, the power and duty of the Courts to declare unconstitutional legislation void, has its only *raison d'être* and its only permanent sanction in the duality of government. Without this duality the power of amending the Constitution would be so simplified as to insure the supremacy of temporarily popular forms of legislation over any general principle of right no matter how solemnly declared or established in the so-called fundamental law.

The duality of government can only survive, however, if its ultimate constitutional sanction—the unamendable proviso of Article V—is given full effect.

SENATORS OF THEIR OWN SELECTION.

Unless the States are protected in their right to vote their sentiments through Senators of their own selection whose representative character cannot be undermined by changing, against its will, the whole nature of the constituency that elects them, then the people in their organized, corporate, responsible capacity are robbed of their voice in the government.

The people of Maryland, an ancient, organized, responsible commonwealth, had the right to be represented in the Senate by two Senators elected

by their legislature, or—since the 17th Amendment to which they willingly consented—by the voters who form the constituency of that legislature, and are authorized by the laws of the State to exercise the franchise and, either directly or by representatives, express the sovereign will. The Nineteenth Amendment, to which the people of Maryland did not consent either directly or indirectly, divides in half the voting power of these voters by adding an equivalent number of other persons who were never authorized by the laws of the State to vote at all. That these persons are women has nothing to do with the case. The suffrage of the State in the Senate has been subjected to a change whose effect cannot be measured, but which may be altogether radical. Certainly if this can be done in regard to one electoral qualification it may be done in regard to any others, and the guarantee against depriving the State of its suffrage in the Senate may be nullified,—indeed has been nullified,—by changing it in kind if not in number. Such a method may more completely disfranchise the State than a reduction of the Senatorial representation to a proportionate basis, because if the very electors can be changed without the will of the State its actual vote in the Senate can be so changed.

FIXING QUALIFICATIONS OF VOTERS.

The fixing of qualifications of voters is one of the highest attributes of sovereignty. The whole nature of the government, whether oligarchic, plutocratic, aristocratic, democratic, depends on this. If the American people really constitute a sovereign nation they ought to retain the power in their own hands of fixing these qualifications. The Constitution so left it, and in order to do this sacrificed the pedantic desire for uniformity. The qualifications for suffrage have therefore been almost always and everywhere in America what the prevailing

public opinion dictated. The early aristocracies and oligarchies developed into democracy through this sovereign power. But if the qualifications of voters are prescribed in the Constitution then this power is withdrawn from the people entirely. A few legislators in a few small States (e. g., 167 State Senators properly distributed among thirteen State Senates), can block any change. The free expression of public opinion falls beneath the dead hand of an arbitrary, virtually irrevocable standard. Not only is the free suffrage of the States taken away, but the highest sovereign attribute of the American people is subjected to the control or the caprice of a few local assemblies.

The granting or enlarging of powers in the Constitution to the Federal Government may not lessen the control of the people as a whole upon their exercise, but the writing in the Constitution of a restriction on the qualifications for the electoral franchise actually withdraws from the people of the United States the power of deciding how and by whom they wish to be governed.

The most essential question, in whom shall ultimate power be reposed, was therefore left to the people in their locally organized, responsible, corporate communities, because there only could they act with reasonable directness under conditions of full and open discussion and definite responsibility. As Chief Justice Marshall says: "When they act, they act in their States." (*McCulloch vs. Maryland*, 4 Wheat. at 402.)

THE CORPORATE VOICE OF THE STATES.

The direct or indirect expression of the corporate voice of these self-governing communities having a distinct individuality and a historic continuity is truly the voice of the American people. It is only in the giving of

such expression by communities that adequate public discussion,—the exchange of views among neighbors, acquaintances and the leaders of public opinion,—can be had. If the voice of these communities, with their local points of view,—even their idiosyncracies,—be silenced, American democracy will be cut adrift from its moorings and start under unknown masters upon an uncharted sea.

It may be argued that when three-fourths of these organized communities attach so little value to their corporate existence and suffrage as to be willing to surrender it, the principle of State indestructibility has outlived its usefulness. Even so, a Court sworn to support the Constitution which enshrines this principle could not conscientiously refuse it its high sanction, as a part of that supreme law which it is bound to enforce. But from a different point of view the Court's duty is the same. One-fourth of the States today may contain within their limits a majority of the population and far more than a majority of the wealth and organized industrial power of the land. The abdication by the remaining three-fourths of their corporate existence and functions might not, therefore, be in accordance with the judgment of even a numerical majority of the American people. But were all the States save one to abdicate today, the opinion of that one might well prevail ten years hence when the temporary delusion of the rest had run its course. In the Convention of 1787 the small States of Delaware, Connecticut and New Jersey almost alone seemed to care for the perpetuation of their individuality as communities, but in 1798 the great State of Virginia led the way in defence of that principle its representatives in the Convention had sought to destroy, and for sixty years the most populous and powerful of the States followed its lead. States readily consent to forego their privilege when they desire measures which are favored by the

majority; but when they find themselves in the minority they take a different attitude.

If the Constitution exists not for a day, but for a period of time that is intended to coincide at least with the extent of the loyalty of reasonable and intelligent men to its main purposes and provisions, then until that period shall have elapsed it must be protected by the Court which it had established for its own protection.

NO MANDATE IN THE RATIFYING STATES.

In the present case it must be remembered that of the thirty-six States proclaimed by the Secretary of State as having ratified the Nineteenth Amendment, twenty-nine did so at special sessions of their Legislatures called for the purpose at a time when a national presidential election was approaching, and not one of these twenty-nine Legislatures was elected by the people at a time when the amendment was in issue, it having been proposed by Congress subsequently to their election. In nine of these twenty-nine States, however, the people had by popular vote rejected woman suffrage amendments to their State constitutions, often by heavy majorities, from time to time between the years 1914 and 1918, inclusive, while in five others the sentiment in favor of woman suffrage had never been strong enough to induce their Legislatures to propose such amendments.

There can, therefore, not only be no presumption of a popular mandate in favor of ratification in fourteen of the alleged ratifying States, but there is the strongest possible reason for believing that their Legislatures misrepresented and virtually defied their constituents by voting for a measure that even in its purely local form had never been desired or had been expressly repudiated. For instance, the Ohio Legislature, elected ~~after~~ *before* the

amendment was proposed, in ratifying it at a special session in June, 1919, ignored adverse popular majorities on State woman suffrage amendments of 87,455 in 1912, 182,905 in 1914, and 146,120 in 1917. The West Virginia Legislature, if counted as ratifying, similarly ignored an adverse majority of 98,067 at a referendum on woman suffrage held in 1916. Arkansas, Iowa, Maine, Missouri, Nebraska, North Dakota and Texas likewise voted through special sessions of previously elected legislatures in a sense contrary to the indicated will of their electorates in recent referenda.

We do not mention the eight States which alone ratified at regular sessions of their legislatures, though among these Pennsylvania, New Jersey, Massachusetts and Wisconsin were States where the people had recently and emphatically repudiated woman suffrage at the polls, when submitted directly to their decision. Of these the New Jersey Legislature alone was elected after the Amendment had been proposed. Nor do we emphasize the absence of any mandate from the people of the fifteen woman suffrage States (all of which ratified at *special* sessions of their legislatures) to impose woman suffrage upon other States that for various reasons did not desire it.

The fact remains that only four out of all the ratifying legislatures, to wit, Rhode Island, Kentucky, New Jersey and Vermont were elected after the amendment had been proposed.

The Legislatures of the nine States of Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi and Louisiana, elected in each case after the Amendment had been proposed by Congress, rejected it. The Legislature of Florida has not acted upon it. The action of the Legislature of Tennessee is legally doubtful, as we contend that its final vote of definite rejection should prevail over the preliminary

vote when by a majority of one the House passed a resolution of ratification which it later duly reconsidered under its rules and defeated by a substantial majority.

The record is open, and will convince any unprejudiced mind that the ratification of the Nineteenth Amendment, even if actually and validly obtained in accordance with the Constitution, can only in a highly technical sense be construed as the act of the people of the United States. It may have been done by the accredited agents of the people, but in very many cases those agents acted not only without any evidence that their constituents desired it, but in the face of the most definite evidence that they did not.

It is, therefore, quite idle to base on the ratifications as proclaimed any argument that the American people as a whole are ready to destroy the constitutional scheme of an indissoluble union of indestructible self-governing States. The American people are entitled to rely upon the safeguards of the Constitution, and on the Supreme Court, against the misrepresentative action of political assemblies, just as much when these can plead no popular mandate for their acts as when they can throw the responsibility back on some ill-considered impulse of their electors.

THE 33 MALE SUFFRAGE STATES.

The Nineteenth Amendment adds to the electorate of all the thirty-three male suffrage States, including Maryland, a vast body of citizens whom the prevailing public opinion of those States had excluded. In a political sense it changes the composition of those States. In actual fact it changes the vote of those States in the Senate. It does this perhaps less conspicuously than would an amendment excluding property owners, or persons of certain religious faiths, or tillers of the soil, but

it effects a change nevertheless. If any such change can legitimately be made against the will of the State concerned then every such change may be.

PRESUMPTION OF CONSENT TO 15TH AMENDMENT.

The Court of Appeals of Maryland admits this conclusion. Unable to see any distinction in principle between the Fifteenth Amendment adding negroes to the electorate and the Nineteenth adding women, it felt constrained to hold that the validity of one established the validity of the other, and to follow the decisions of this Court which without discussing the question had apparently assumed the former to be binding. For no other reason did the Maryland Court hold the Nineteenth Amendment to be valid, expressly refusing to pass upon the objections here made, but recognizing their weight and importance were it free to consider them.

The Maryland Court failed, however, to consider a vital distinction. No one denies that a State may consent to any measure so impairing its individuality as to deprive it of its suffrage in the Senate, and that with such consent an amendment may become valid that is otherwise invalid, at least in the non-consenting State. How that consent may be evidenced is nowhere explicitly stated. Doubtless a State convention could grant it, perhaps a State legislature in the act of ratification. But at any rate if after ratification by other States a State through its legislature accepts the amendment as being in force, holds repeated elections in which the enfranchised voters are not only permitted to participate, but protected by State laws in so doing, and without protest by or on behalf of any of its citizens, pursues this line of conduct for forty-five years, it would be difficult in the extreme for any Court not to entertain the presumption that the consent had been granted or at least could not longer be deemed to be withheld.

NO CONSENT TO 19TH AMENDMENT.

Leaving out of consideration the very different antecedent circumstances, which this Court may or may not have deemed to have removed the question of consent from the judicial sphere altogether as a matter that was determined politically, in the case of the Fifteenth Amendment, we come to consider the Nineteenth Amendment in the light of the fact that the Legislature of Maryland (elected when the Amendment was in issue, and both the leading parties in their State platforms had declared against its ratification) which alone has attempted to speak and did speak for the people of the State in the matter, has expressly rejected it in a set of denunciatory resolutions of the most positive character. We find also the further fact that after the proclamation of ratification by three-fourths of the States had conferred in the eyes of many persons a binding and irrevocable character on the measure, unless held invalid by the Courts, the Legislature of Maryland was again called into session to pass such acts as would enable the ordinary registration and election machinery of the State to function in the practical exigency foreseen as a result. A resolution to ratify the Amendment was introduced again at this session, as it had been at the previous session, but notwithstanding the pressure from woman suffrage advocates and the sentiment of the large class always anxious to defer to the prevailing side, this resolution was defeated in the State Senate by practically the same two-to-one majority that had defeated it previously. In the House of Delegates it suffered the ignominy of not being deemed worthy of a roll-call. The General Assembly increased the number of registration days and made provision for increasing the number of polling places and facilitating the count of an increased number of ballots and provided that words in the election statutes importing the masculine gender should be construed to include the feminine, and

that the sex of the applicants shall be noted on the books, but yielded no further, and not only did not express any consent to the Amendment, but as stated took occasion to defeat such expression.

While, therefore, it was competent for this Court in *Myers vs. Anderson*, 238 U. S. 368, and in *Guinn vs. U. S.*, *ib.* 347, to ignore objections to the validity of the Fifteenth Amendment, if any were made, for the reason that after forty-five years of active acquiescence on the part of Maryland and all other States, their consent must be presumed, or there would be nothing settled and nothing secure, no such condition here obtains, and unless the objections to the Nineteenth Amendment are believed to be in themselves without weight or merit, we submit that the Court is bound to determine that if this Amendment does in fact exceed the scope of the power of amendment granted to certain agencies by Article V, it is void or inoperative.

2. CERTAIN LIMITS TO THE AMENDING POWER ARE IMPLIED FROM THE NATURE OF THE GOVERNMENT.

If there were no irrepealable proviso in Article V of the Constitution we nevertheless would contend that the power to amend that instrument is not in its nature unlimited, but that by reason and authority this Court is bound to the view that the Constitution recognizes and establishes certain definite relations which cannot be dissolved or seriously impaired without wrecking its structure, quenching its spirit and violating the purpose which the people of the United States had in view in adopting it. We contend that a measure that impairs the fundamentals of these relations is not an "amendment" at all, that neither Congress nor State Legislatures ever were intended to have any power to violate the primary purposes of their creation or existence.

The fundamentals of our Government and Constitution have been defined by this Court in numerous and weighty opinions, from some of which we will quote:

FUNDAMENTALS OF OUR GOVERNMENT.

"The perpetuity and indissolubility of the Union, by no means implied the loss of distinct and individual existence, or of the right of self-government by the states. * * * 'The People of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,' and 'without the states in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible union composed of indestructible states." (*Texas vs. White*, 7 Wall. 700.)

"It is admitted that there is no express provision in the Constitution that prohibits the Federal Government from taxing the means and instrumentalities of the state. Nor is there any prohibiting the state from taxing the means and instrumentalities of the Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" (*Collector vs. Day*, 11 Wall. 113.)

"When the American people created a national legislature, with certain enumerated powers, it was

neither necessary nor proper to define the powers retained by the different states. These powers proceed, not from the people of America, but from the people of the several states, and remain, after the adoption of the Constitution what they were before, except so far as they may be abridged by that instrument." (*Sturges vs. Crowninshield*, 4 Wheat. 193.)

"The powers delegated to the state sovereignties were to be exercised by themselves, and not by a distinct and independent sovereignty created by themselves. * * * In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it and neither sovereign with respect to the objects committed to the other. * * * The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission. * * * We are relieved * * * from clashing sovereignty; from interfering powers; from a repugnancy between a right of one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.

* * * Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know that they would not. Why then should we suppose, that the people of any one state would be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests?" (*McCulloch vs. Maryland*, 4 Wheat. 403, 410, 420, 429, 431.)

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"* * * In interpreting the Constitution it must never be forgotten that the Nation is made up of

States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.' *Lane County vs. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." * * *

"* * * This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

"* * * The act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed." (*Hammer vs. Dagenhart*, 247 U. S. 251, 275, 276.)

MEANING OF STATE SOVEREIGNTY.

The word "sovereignty" is without meaning if it does not connote independence in determining the chief question in every political society, namely, in whom to vest the ultimate power or expression of supreme authority within the State. If our States cannot do this *independently*, then their sovereignty is and always has been a sham, and its repeated recognition by this High Tribunal and by many of the greatest jurists who ever

adorned its bench must be deemed mere empty, though high sounding phrases.

Of course we concede that a word cannot be made to mean too much. The fact that our States are called sovereign does not entitle them to all sovereign attributes, for many of these have been surrendered. It is admitted, however, by all that, outside of the powers specifically created and therefore conferred by the Constitution, with regard to electing Senators, Representatives and Presidential electors, all the powers of the States are powers of *residuary sovereignty*,—the residue of sovereign power that belongs to them because they are in fact the sovereign people locally incorporated in separate self-governing communities. This conception is common both to the original States that were once practically little independent nations, and to the newer ones created under the Constitution. They are sovereign because they are the corporate expression and life of the American people.

While they have not all the attributes of sovereignty in themselves, there being another agency or corporation of the people, to wit, the United States, which enjoys those not possessed by the States, yet they cannot be sovereign at all if they are not independent in the matter of determining for themselves the basis and qualification of their electorate, i. e., who shall govern them. If they cannot do this wherein do they differ in kind from municipalities? The latter have no rights which they can plead against the power of the people of the States which create them. No more would the States have if their electorate, and hence their governments, can be made or unmade by outsiders—persons and bodies whom they cannot control.

AN INDESTRUCTIBLE UNION OF INDESTRUCTIBLE STATES.

The answer is made sometimes by our opponents that the States in adopting the Constitution *consented*

to forego the privilege of determining who should govern them in final analysis, by conceding such power to a two-thirds majority in Congress wherein they are fairly represented, and the legislatures or conventions of three-fourths of all the States. But is this any answer? Is it not merely begging the question? If the purpose of the framers of the Constitution was as stated by ~~Millard E.~~ *Millard E.* in *Texas vs. White*, to create an indestructible Union of indestructible states, could they have intended to grant to any governmental agencies the power to destroy what they determined should be indestructible? Would any State have ratified the Constitution if such a purpose had been either avowed or suspected? In many ways the independence of the States was curtailed and the States' Rights advocates of the day zealously opposed ratification for that very reason, but if it had been seriously believed that the actual existence of the States, their power to choose their own State governments, and their power to select their representatives in the Senate, were to exist only on sufferance of a three-fourths majority, it is doubtful if a single State would have ratified the Constitution.

It is true that in the Convention (5th Elliott Deb., p. 551) Roger Sherman expressed the fear that abolition of particular States might be accomplished by Constitutional Amendment, and accordingly he proposed a proviso against affecting any State in its internal police or depriving it of its equal suffrage in the Senate. The brief memorandum of the debate, found in Madison's papers, shows that the Convention felt a specific guaranty of the immunity of a State's internal police might produce embarrassment, as no doubt it would. "Internal police" is nowadays a broad term. The other part of the proviso was accepted, as of course the equality of suffrage was within reach of the amending power unless specially excepted, and the Convention was quite willing that the

great compromise which made possible the adoption of the Constitution should receive this ultimate and definite sanction, and so be set at rest. In guaranteeing the definite right of equal suffrage they were, of course, guaranteeing the existence and, as we contend, the independent and uncontrollable existence of the States to which that right belonged. But even without this specific guaranty, the free existence of the States must have been always intended, for the reason, if for no other, that the Constitution never purported to be a substitute for the State Constitutions, and that it was from beginning to end incomplete and unintelligible unless the independent co-existence of the States were assumed as a postulate.

DESTRUCTIVE AMENDMENTS CONSIDERED.

Suppose an amendment were passed (ratified by three-fourths of the States), providing that State Legislatures should be abolished and their powers transferred partly to Congress and partly to local boards appointed by the central power and forbidding the assembling of State Conventions. Would this not amount to destroying the States and the Union? How in the future could other amendments be ratified? Not by the local boards, for the people of the United States never conceded the power of ratification to any such bodies whose acts could not bind the people of the States. Amendments would then either be impossible to obtain, or would derive validity solely from the Act of the central power. In place of our Constitution we would then have the despotism of imperial Rome. "*Quod principi placuit habet legis vigorem.*"

Or suppose an amendment (actually advocated by Mr. W. J. Bryan and many others) providing for a national referendum on all matters including constitutional amendments, and of course to be decided by mass vote irrespective of the States. What would then become of

the Congress, equal suffrage in the Senate, ratification of amendments by three-fourths of the States, ratification of treaties by two thirds of the Senate, guarantee of republican form of government to each State, reservation of powers not granted in the States respectively or the people? A mere numerical majority—the usual small percentage of odd voters, who decide all elections,—would have supreme and uncontrollable power necessarily overriding the States, the Congress, the Courts, the entire Constitution. Obviously the proviso for equal suffrage in the Senate precludes any such amendment without unanimous consent of the States, but even without any such proviso we contend that an amendment of such a nature dissolving both the compact and status of the Union would be *ultra vires*,—that the Constitution was never intended to contain within itself the seed of its own destruction.

THEIR PEOPLE ALONE CAN DESTROY THE STATES.

Chief Justice Marshall said that the people of the United States made the Constitution and the people can unmake it. (*Cohens vs. Virginia*, 6 Wheat. at 389.) They may indeed suffer it to expire by neglect, but they can unmake it only in the same manner in which they made it. Their State Governments, directly representative bodies, chose members of a convention, who framed the Constitution. Having framed it they submitted it again to the people who assembled, under Acts passed by their respective State Legislatures, in sovereign conventions of delegates elected in each State for the purpose of passing upon it. The people of those States who, in such conventions assembled, ratified the Constitution became bound thereby, but until they ratified they were not bound. Whenever the sovereign people shall again assemble in conventions in their respective States and agree that their States be abolished and all their powers transferred to a

central autocratic board, cabinet, parliament, or what not, then the Constitution may no longer be the supreme law of the land in those States. But we deny that even with the sanction of two-thirds of both Houses of Congress any State Legislature may vote to deprive the people of its own State of the benefit of that supreme law which they adopted of their free will forever when they entered the Union. Much more strongly do we deny that any number of State Legislatures can by combining or conspiring together with two-thirds of the Congress deprive other States than their own against their will of the rights and privileges which belong to their people as members of the United States. They may indeed amend, they may not destroy, the Constitution.

CONSTRUCTIVE AND DESTRUCTIVE AMENDMENTS DISTINGUISHED.

How then could this Court distinguish between constructive and destructive amendments? This difficulty ought not to appear insuperable to a distinguished tribunal of common lawyers. A condition inserted in a deed repugnant to the premises is void. And yet the condition may prescribe nothing immoral or illegal, and its insertion is clear proof that the parties to the instrument whose hands and seals are thereto affixed agreed to it. Yet it is void because it destroys the whole scheme of things contemplated by the parties themselves in making the deed. John Doe conveys his farm to Richard Roe and his heirs and assigns in fee simple forever, on condition that Richard Roe shall never alien it. The condition destroys the fee simple ownership which was the plain purpose of the deed. It is therefore void. And so, when the people of the United States in order to form a more perfect union established a Constitution to be the supreme law of the land in every State that should ratify it, and that should bind the governing powers and officials of

such States as well as those of the Union, they did not assent to the vesting in even a two-thirds majority of Congress or the Legislatures of any number of States of power to destroy the Union made more perfect or to obliterate the self-governing States of which that Union was composed. Their purpose was to create United States, not United provinces. The pretended power in Congress and Legislatures to destroy Union or States or both is a power repugnant to the whole instrument which created the Congress. Without the States in Union there could be no Congress. It never received a mandate to destroy its own creators.

IMPLIED LIMITATIONS ILLUSTRATED.

Suppose an amendment to the Constitution abolishing the power of the Courts to construe and apply the Constitution and pass on the validity of legislation challenged for unconstitutionality. This would operate to repeal that clause which says the Constitution is the supreme law of the land. Henceforth not the Constitution, but the latest legislative vagary must be the supreme law. If nine States or one State refuses to consent to such an amendment is it not within its right to say that such amendment is without force within its borders? Never did the people of the United States consent that their Constitution could be made less than the supreme law by the action of any body which owed its existence or power to act to that Constitution. The Federal Courts might perhaps be abolished by amendment, fantastic and fatal though such an amendment might be, but as long as any Court remained in the land composed of upright judges so long must any measure clearly contrary to what the people have established as the supreme law of the land be denounced as void when questioned in such Court.

We contend then that the necessarily implied limits to any power under the Constitution, including the broadest

of all,—the power to amend,—are found when the ineradicable duality of the government and of the very conception of the people of the United States, and the supremacy of the fundamental law which, in their dual capacity, they established, are either threatened or attacked. You cannot compound the people into one physical mass of humanity because the words “people of the United States” mean something essentially different, and in so compounding you destroy an essential political and social characteristic of the American people—their locally organized and self-centered sovereignty. Deprive them of this and they become something less than American citizens. “The people of the United States” does not mean a mob or a Tartar Horde. They ordained a Constitution to be the supreme law of the land in order to form a mere perfect union and to secure the blessings of liberty to themselves and their posterity. Is it conceivable that they granted to any agency the power to add to their great charter conditions repugnant to its very life?

SCOPE OF THE SOVEREIGNTY OF THE PEOPLE.

We conclude, therefore, that irrespective of the proviso wisely annexed to Article V, and irrespective of all that necessarily follows from its perpetual sanction, there is a thing about the people of the United States that no Congress and no Legislature can take from them, and if they lose it they will have given it up themselves,—and that thing is that they are sovereign. When they get together under their own laws, in their own states, they can govern themselves in respect to all matters which they have not consented to pool with their common representatives in the Federal Government. Their right to govern themselves as to local matters not delegated is ineradicable. The subjects of government may be reapportioned between States and Congress, but the sovereign

individuality of the people in each State, and we may add, their right to speak in Congress through representatives chosen by their own voters, by voters whom they alone have created and qualified as such, cannot be taken from them without obliterating the Constitution which from Marshall to Lincoln was described as a form of government of the people, by the people, for the people. As Marshall said, it is only in their States that they can act at all. Outside of their States all their power is delegated, dissolved among a host of agents whom they cannot directly control. But in their States they can directly make and unmake constitutions and statutes. They can vote directly upon such issues. They can meet in assemblies of limited powers or conventions that recognize no limits except those imposed by membership in the Union, and allegiance to its supreme law. But none of these things can they do, if their electoral franchise may be taken away from them or diluted by agencies that they did not elect and cannot control,—if some 36 State Legislatures without even a mandate from their own people can disfranchise the voters of 48 States. Destroy the power of the people in their several States to decide for themselves who may vote, and their sovereignty has become a myth, their freedom an illusion, their Constitution a fraud.

II.

THE NINETEENTH AMENDMENT WAS NEVER LEGALLY RATIFIED BY THE LEGISLA- TURES OF THREE-FOURTHS OF THE STATES.

It was also alleged by Petitioners that an insufficient number of States had actually ratified the Nineteenth Amendment at the time it was proclaimed by the Secretary of State, and that although another State (Connecticut) had subsequently done so the number was still short

of the required three-fourths. A second State (Vermont) has since been added, but if Petitioners are right in the assertion that for various reasons Tennessee, Missouri and West Virginia ought not to have been counted as ratifying States, the number is still short, and likely to remain so. Furthermore, if the 11th prayer of Petitioners is sound, to the effect that the power to amend the Federal Constitution does not include the power to amend State Constitutions where these concern solely the establishment or definition of the local government of the States and do not trench on ground that is or may become a field for Federal power, then the ratification by the legislatures of all the 23 male suffrage States counted as having ratified would fall, as an attempt under Article V to amend their State Constitutions in a matter of no lawful concern to any States but their own.

STATE CONSTITUTIONAL LIMITATIONS VIOLATED.

The specific objections to the alleged ratifications by Tennessee, West Virginia and Missouri all come under the general head that local constitutional limitations on the power of the legislatures, or requirements of procedure for the orderly determination of the legislative will, were brushed aside as having no bearing on the ratification of Federal Amendments. The decision of this Court in *Hawke vs. Smith*, 253 U. S. 221, was taken to signify that the Legislatures could not be governed by anything in State Constitutions in ratifying amendments because their power to do so is derived from the Federal Constitution.

We do not so understand *Hawke vs. Smith*. This Court there held that the Constitution having prescribed legislative assemblies or deliberative conventions as the alternative machinery for ratifying amendments, the States could not add to this machinery a plebiscite or referen-

dum. Nowhere does the Court intimate that the legislatures so designated in the Constitution were to be absolved from obedience to the law of their own creation, i. e., the State Constitutions by which alone they exist, or that they could be freed from the shackles of orderly procedure in ratifying amendments that would bind them in all ordinary acts.

CONTENTIONS OF APPELLEES.

We do not understand our opponents or the Court below to deny that only a quorum of each House can act at all, that they can only act when duly called into session in the manner and at the time and place prescribed by their State Constitution, that amendments are subject to reference to committees, reports, recommitments, and all the ordinary incidents of parliamentary procedure, and that they require the separate assent of both houses of each legislature. Yet they contend that reconsideration of a vote, permitted by the rules of a house in the case of any other bill or resolution cannot be allowed, if the vote is in favor of such an amendment, though doubtless they would concede it might be allowed if the vote was against the amendment. They also contend that a well established rule of procedure forbidding a second reconsideration of a vote, after one motion to reconsider had been defeated has no application to a Federal Amendment, and that a presiding officer may refuse to decide a point of order against such renewed consideration of an amendment when the rules provide that all points of order must be submitted to his decision subject to appeal. Furthermore they contend that reasonable provisions of State Constitutions designed to make the Legislature truly representative of the will of the people as contemplated by the Constitution and as described by this Court in *Hawke vs. Smith*, such as that a legislature elected prior to the submission of an amendment by Congress shall not act

upon it at all (as ordinarily unless called into special session it would rarely have an opportunity to do) are void as withdrawing from the Legislature the omnipotence that they attribute to it in regard to ratification. Lastly they deny the right of the people of any State in their Constitution to forbid their own Legislature to barter away their sacred birthright of self-government as did the people of Missouri.

LEGISLATURES SUBJECT TO THE LAW THAT CREATED THEM.

If there were anything expressed or implied in Article V, or in any other part of the Constitution, that was inconsistent with any of these local provisions it is conceded that they would fall. But none of them exhales anything but the very breath of American free and orderly representative government. Every one knows that legislatures are governed by rules of procedure designed to prevent fraud, chicanery and the betrayal of the people's will. That is why matters are referred to such bodies at all. If they acted as mere mobs they would never have retained a place among our institutions. In spite of these precautions their not infrequent infidelity to their constituents has led in every State to the adoption of bills of rights and other express prohibitions against specifically defined acts which the people consider dangerous. (*Haire vs. Rice*, 204 U. S. 291.)

This was as true in 1787 when the Constitution was framed as it is now, and it was with full knowledge of the general character of such restrictions on legislatures that the convention bestowed on them the power of ratifying amendments. The alternative reference to State Conventions was no doubt especially designed for cases that had been withdrawn from legislative competence by the people. No other ground can be shown for including the alternative, and the discussion in the convention on the

method of ratification of the Constitution itself demonstrates that this was the sufficient reason. (See also *McCulloch vs. Maryland*, 4 Wheat. at 403, 404.)

We, therefore, contend the Court below erred in denying effect to the constitutional restrictions on the legislatures of Tennessee and Missouri, and in denying finality to the vote against ratification by the West Virginia Senate which, according to the rules of that body and their apparently accepted interpretation in regard to all ordinary acts, had become final. Even if the Court disagree with us on one or more of these propositions, we submit that each question so raised is now properly in issue and ought to be decided so as to preclude future dispute.

Respectfully submitted,

THOS. F. CADWALADER,
GEORGE ARNOLD FRICK,
WM. L. MARBURY,

For Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,

VS.

J. MERCER GARNETT, ET AL.

MOTION TO ADVANCE.

Now come the plaintiffs in error, Oscar Leser, Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hemsley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, and William P. E. Wyse, by William L. Marbury, their attorney and counsel in this case, and respectfully move the Court to advance this case on the docket of the Court and grant an early hearing therein, for the following reasons:

1. Because this is a test case to decide whether the alleged Nineteenth Amendment to the Constitution of the United States, proposed for the purpose of conferring upon female citizens in every State the right to vote on the same terms enjoyed by male citizens therein, is valid under the provisions of Article V, as a part of the Constitution even in States that have not consented thereto, or is invalid because in direct conflict with Article V, or because beyond the scope of the power conferred by said Article.

2. Because this case is brought to test the validity of the ratification of said amendment by the legislatures of certain States which have heretofore by the Secretary of State of the United States been counted as having ratified the same, and whose votes would be necessary in any event to be counted in favor of said amendment in order to its valid adoption as a part of the Constitution, although plaintiffs in error have offered evidence to show (a) that certain of said legislatures did not in fact ratify said amendment by an affirmative vote of both Houses but on the contrary defeated the same by a negative vote in one House, and (b) that certain of said legislatures were prohibited by the Constitutions of their respective States from ratifying the said amendment, and hence any alleged resolution of ratification that may have been passed by them was *ultra vires* and void.

3. Because this is a test case brought to decide whether the power of amendment conferred on Congress and the legislatures of three-fourths of the States by Article V of the Constitution is virtually unlimited or whether it is so limited that a change in the electorate of the several States as established by their own people in their own State Constitutions can be effected only by the people of each State in the manner they have prescribed or subject to their consent.

4. Because pending the decision of the foregoing questions the validity of the right of women in the State of Maryland and in a large number of other States to vote remains doubtful, and the pendency of elections therein for members of the legislature and for State and local or municipal officials, and for Senators and members of the Congress of the United States, renders the early decision of these questions a matter of the highest public importance.

And in support of this motion the plaintiffs in error respectfully pray the consideration of the Court to the brief and the supplemental brief heretofore filed in their behalf in support of their petition for the issuance of a writ of certiorari herein.

WM. L. MARBURY.

For Plaintiffs in Error.

Service of a copy of this motion admitted this
day of October, 1921.

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LESER ET AL. v. GARNETT ET AL.

ERROR AND CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 553. Argued January 23, 24, 1922.—Decided February 27, 1922.

1. A suit by qualified voters of Maryland to require the Maryland Board of Registry to strike the names of women from the register of voters upon the grounds that the state constitution limits the suffrage to men and that the Nineteenth Amendment to the Federal Constitution was not validly adopted, is maintainable under the Maryland law and raises the question whether the Nineteenth Amendment has become part of the Constitution. P. 136.
 2. The objection that a great addition to the electorate, made without a State's consent, destroys its political autonomy and therefore exceeds the amending power, applies no more to the Nineteenth Amendment than to the Fifteenth Amendment, which is valid beyond question. P. 136.
 3. The Fifteenth Amendment does not owe its validity to adoption as a war measure and acquiescence. P. 136.
 4. The function of a state legislature in passing on a proposed amendment to the Federal Constitution, is federal, and not subject to limitation by the people of the State. P. 137. *Hawke v. Satch*, 253 U. S. 221, 231.
 5. Official notice from a state legislature to the Secretary of State, duly authenticated, of its adoption of a proposed amendment to the Federal Constitution, is conclusive upon him, and, when certified to by his proclamation, is conclusive upon the courts. P. 137. *Field v. Clark*, 143 U. S. 649, 672, 673.
- 139 Md. 46, affirmed.

CERTIORARI to a decree of the court below affirming a decision of the state trial court dismissing a petition by

130.

Argument for Plaintiffs in Error.

which the plaintiffs in error sought to require the members of the Maryland Board of Registry to strike the names of specified woman voters from the registration list.

Mr. Thomas F. Cadwalader and Mr. William L. Marbury, with whom *Mr. George Arnold Frick* was on the briefs, for plaintiffs in error and petitioners.

The only power to amend the Constitution is contained in Article V, and is a delegated power. *Hawke v. Smith*, 253 U. S. 221, 227; *Dodge v. Woolsey*, 18 How. 348. It is a power to "amend," granted in general terms.

In a series of decisions rendered soon after the Civil War, this court established the doctrine propounded by Mr. Lincoln in his first inaugural address, that the Union was intended to be a perpetual Union,—“an indestructible Union of indestructible States,”—and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that “great and leading intent” of the people, *Ex parte Yerger*, 8 Wall. 85, 101,—by destroying any of the States, by taking away in whole or in part any one of the “functions essential to their separate and independent existence” as States. *Lane County v. Oregon*, 7 Wall. 71; *Texas v. White*, 7 Wall. 700, 724–725. Obviously Article V must be so construed as not to defeat the main purpose of the Constitution itself.

A “State” within the meaning of the Constitution is not merely a piece of territory, or a mere collection of people. It is, as this court has said, “a political community.” Who constitute the State in that sense? Clearly the people who exercise the political power. That is to say, the electorate and those whom the electors of a State choose to clothe with the governmental power of the State. When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created.

Questions of power do not depend upon degree. *Brown v. Maryland*, 12 Wheat. 419, 439; *Keller v. United States*, 213 U. S. 138, 148.

The power to amend is granted in no broader language than that in which the taxing power is granted in § 8, Art. I. Yet this court held, in *Collector v. Day*, 11 Wall. 113, that it would not construe that language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a state judge, for the same reason we urge here. If the power to maintain a judiciary whose salaries shall be exempt from taxation by Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission or the ratification of such an amendment. But even so, as said in *Collector v. Day*, exemption from such an amendment "rests upon necessary implication, and is upheld by the great law of self-preservation."

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects. It might be a sufficient answer to that contention to say that the maxim *expressio unius exclusio alterius*, while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the courts would certainly look to the consequences which might follow such an interpretation. *Slaughter-House Cases*, 16 Wall. 36, 78. But perhaps a more conclusive answer will be found in the fact that the same argument was rejected as applied to the taxing clause. *Collector v. Day*, *supra*; *Evans v. Gore*, 253 U. S. 245.

The decision of this court in the *National Prohibition Cases*, 253 U. S. 350, constitutes no precedent for holding valid the Nineteenth Amendment. The Eighteenth Amendment did not attack or interfere with the government of the State—"the structure of the state government"—or deprive it of any function "essential to its separate and independent existence."

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it may be deprived of its equal suffrage in the Senate; and, second, that it may not by any amendment be deprived of its power to give or refuse its consent.

It is easy to see that, if any interference with the electorate of a State be permitted, its power to refuse its consent to any amendment which may hereafter be proposed, including an amendment reducing the number of its Senators, may be taken away.

The consent of the State cannot be given or refused except by the will expressed either directly or indirectly of the State's own voters. Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether. Hamilton, *The Federalist*, No. 59, pp. 238, 239.

The various cases decided by this court since the Civil War, including *Myers v. Anderson*, 238 U. S. 368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the States—has been, in fact, consented to, how-

ever reluctantly, by each and all of them,—is valid, and must be accepted by this court as being valid when the question of its validity was raised for the first time, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

While it may be true that no formal treaty of peace was entered into by the Government of the United States and the Confederate States, or any of them, the substance of a treaty was enacted in the Thirteenth, Fourteenth, and Fifteenth Amendments. *Slaughter-House Cases*, 16 Wall. 36, 67, 71.

It may be true that this involves the contention that the effect of war and the necessity of taking measures to prevent the recurrence of war expands the amending power, but it is submitted that there is nothing unreasonable in that contention. The same effect would undoubtedly be produced by the same causes upon the treaty-making power.

If, after the expiration of a period of forty-five years, the validity of a treaty, by which this country made the best terms it could to end a disastrous war, were called in question as the validity of the Fifteenth Amendment was called in question for the first time in *Myers v. Anderson*, would not this court deal with the objections to its validity in the same way in which it dealt with the objections urged against the validity of the Fifteenth Amendment in that case, viz: ignore them altogether and decide all other questions raised with the tacit assumption that the treaty was valid?

After the Fifteenth Amendment had been proclaimed, the States which had refused ratification, and their people, evidenced their consent and acquiescence in the clearest possible way, by not only refraining from challenging its validity for forty-five years, but in passing laws either for the enforcement of the amendment or in recognition of its validity.

130.

Opinion of the Court.

The Nineteenth Amendment has never been legally ratified by the requisite number of States. Tennessee and West Virginia, both of which must be counted to make the requisite three-fourths, in fact refused to ratify the Amendment. The votes upon which the certifications were based were illegal under the local law. The proceedings are subject to judicial inquiry under that law, and by this court.

The legislatures of five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, were, by the provisions of their respective state constitutions, expressly forbidden to adopt amendments of the character of the Nineteenth, and were therefore incompetent to ratify that amendment.

Mr. Alexander Armstrong, Attorney General of the State of Maryland, with whom *Mr. Lindsay C. Spencer* was on the briefs, for defendants in error and respondents.

Mr. George M. Brady, with whom *Mr. Roger Howell* and *Mr. Jacob M. Moses* were on the brief, for Caroline Roberts et al., defendants in error and respondents.

Mr. Solicitor General Beck, by leave of court, filed a brief as *amicus curiae* on behalf of the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On October 12, 1920, Cecilia Streett Waters and Mary D. Randolph, citizens of Maryland, applied for and were granted registration as qualified voters in Baltimore City. To have their names stricken from the list Oscar Leser and others brought this suit in the court of Common Pleas. The only ground of disqualification alleged was that the applicants for registration were women, whereas the constitution of Maryland limits the suffrage to men. Ratification of the proposed Amendment to the Federal

Constitution, now known as the Nineteenth, 41 Stat. 362, had been proclaimed on August 26, 1920, 41 Stat. 1823, pursuant to Rev. Stats., § 205. The Legislature of Maryland had refused to ratify it. The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the contentions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has become part of the Federal Constitution is the question presented for decision.

The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six States including Maryland, has been recognized and acted on for half a century. See *United States v. Reese*, 92 U. S. 214; *Neal v. Delaware*, 103 U. S. 370; *Guinn v. United States*, 238 U. S. 347; *Myers v. Anderson*, 238 U. S. 368. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the constitutions of several of the thirty-six States named in the proclamation

130.

Opinion of the Court.

of the Secretary of State there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State. *Hawke v. Smith*, No. 1, 253 U. S. 221; *Hawke v. Smith*, No. 2, 253 U. S. 231; *National Prohibition Cases*, 253 U. S. 350, 386.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective States. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark*, 143 U. S. 649, 669–673, is applicable here. See also *Harwood v. Wentworth*, 162 U. S. 547, 562.

Affirmed.